

# JUSTICE WIDE OPEN

## WORKING PAPERS

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**CLJJ Working Papers:** ‘Justice Wide Open’ is the third set of working papers in a series from the Centre for Law Justice and Journalism at City University London. This publication by leading lawyers, academics and journalists is part of the CLJJ’s new ‘Open Justice in the Digital Era’ project, launched at an event at City University London on 29 February 2012.

**Leadership and Expertise:** The Centre for Law, Justice and Journalism (CLJJ) is directed by three of City University London’s leading academics, as well as being supported by a number of specialists from the university.

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# JUSTICE WIDE OPEN

These working papers mark the launch of the Centre of Law, Justice and Journalism's new initiative, '**Open Justice in the Digital Era**', which aims to make recommendations for the way judicial information and legal data are communicated in the 21<sup>st</sup> century

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# FOREWORD

***Professor Howard Tumber*** welcomes a much needed public dialogue on open justice in the digital era

The justice system cannot remain alien to the rapid flows of information and collective sharing of resources through social media and other forms of new technology. The justice system must use digital technologies not to violate privacy rights, freedom of expression and other civil liberties, but to safeguard them. The publication of legal data is a requirement that cannot be deferred if citizens are to participate in democratic societies that are based upon public scrutiny and transparency of institutional practices. When the ethos of national security reigns over individual liberties and social justice, the need to research and advocate for an open justice system becomes a matter of urgency.

‘Justice Wide Open’ will hopefully contribute to this challenging enterprise. As the third publication in the Centre for Law Justice and Journalism working paper series, it marks the launch of our new research project: Open Justice in the Digital Era. The project aims to research into the best ways to make legal and judicial data more accessible by using new technologies, and to disseminate the information among policy-makers, lawyers, judges, and the general public.

This edited collection compiles papers presented at the ‘Justice Wide Open’ conference on 29 February 2012 by leading lawyers, academics and journalists who share a similar concern: how to make judicial information more accessible in order to develop and monitor an open justice jury system. The event was organised by Judith Townend who has done an excellent job not only in organising the event but in editing this collection of working papers. Her own research on legal restraints on the interaction between media organisations and defamation and privacy laws has certainly informed the organisation of this important event and this much needed collective publication.

These papers comprise a call for freedom of access to legal information and transparency of court proceedings. We need open courts which welcome the public and the press and inform citizens of how judges are enacting the liberal value of justice. Court reporting needs to take full advantage of new technologies and perform a scrutiny function engaging members of the public. How else can both justice and judges be judged? Openness lies at the very heart of justice. This edited collection therefore will be of great interest to those concerned with how best to serve the public interest, the role of journalism in reporting court cases, free access to legal information, the existing threats to the rule of law, and the ethics of the judicial information system.

Collaborative and interdisciplinary projects like ‘Justice Wide Open’ are the first step towards a much needed public dialogue on open justice. It is in this sense that we greatly welcome it.

**Professor Howard Tumber**

CLJJ Director (Journalism)

*Howard Tumber is Professor of Journalism and Communication within the Graduate School of Journalism, City University London and has published widely in the field of the sociology of news and journalism.*

# INTRODUCTION

***Judith Townend*** explains the origins and aims of the Centre for Law, Justice and Journalism's new open justice project

'Justice must be seen to be done' is the familiar dictum, summarising the principle of open courts, developed in English law since the mid-17<sup>th</sup> century. Despite this long-established tradition for open justice, the English courts have failed to fully utilise online technology for the dissemination of legal knowledge and communication of the courts – as yet. This new publication is a call to action and debate.

The UK Supreme Court, which opened its doors to the public in 2009, leads the way in sharing court proceedings via the internet and television, but other courts in England and Wales lag behind. Publication of legal information has grown up in a piecemeal fashion in the digital era – part privatised, with few central guidelines. The so-called 'super injunction' furore in 2010-11 was partly fuelled by a lack of public data, something the Master of the Rolls is now seeking to remedy with new guidelines for its collection and publication.

The Centre for Law, Justice and Journalism's 'Open Justice in the Digital Era' project was born out of numerous frustrated conversations with lawyers, journalists, academics, computer programmers and bloggers about accessing the courts in the 21<sup>st</sup> century. For many of them, 'open justice' is not their primary research or legal focus but absolutely intrinsic to their daily work and the wider public interest. The issues are extensive and diverse: the recommendations of the government's 'secret justice' green paper, which would see more cases behind closed doors; the decline in local and national court reporting as a result of cuts in journalism; the courts' barriers to entry due to ill-informed staff; and the difficulties in obtaining free legal information.

The project launched with the 'Justice Wide Open' conference on 29 February 2012, at which journalists, lawyers and academics came together to ask how judicial information and courts data could be made more easily accessible and considered the legal and ethical implications of an increasingly open and digitised approach. The speakers<sup>1</sup> explored the history and academic context of open justice, as well as the realities of modern court reporting. Additionally, we invited several other leading figures in the field to also contribute working papers to this subsequent publication.

This collection of working papers will be made available online and also distributed in print to members of government, civil service, lawyers, journalists and academics. We hope it encourages the Ministry of Justice and Her Majesty's Courts

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<sup>1</sup> Listed in Appendix, pg 119



and Tribunals Service to consider an increasingly open and free approach to the diffusion of legal knowledge in the 21<sup>st</sup> century.

In the first section on the tradition and context of open justice, **Geoffrey Robertson QC**, our keynote speaker at the event, sets out the history of the principle and argues that the government's Justice and Security Green Paper's recommendations are simply not be compatible. The Master of the Rolls, **Lord Neuberger**, examines the way in which open justice is said to underpin the rule of law and our liberal democracy and **Dr David Goldberg** looks to Sweden and Scotland for historical and comparative examples of open justice.

The second section explores the flow of legal knowledge: **Hugh Tomlinson QC** makes recommendations for the online availability of case law and lists; while **Emily Allbon** analyses the 'free legal info landscape'. **Nick Holmes** introduces the 'Free Legal Web' initiative and **David Banisar** comments on a 'bold' Court of Appeal judgment ordering the publication of certain documents in criminal proceedings.

In the third section, we examine the role of the media and journalists: **Heather Brooke** describes the evolving culture of 'secret justice' and **Mike Dodd** reflects on the numerous obstacles to court reporting. **Adam Wagner** explains how legal blogs can act as a corrective to poor journalism, while **William Perrin** sets out his own 'courts transparency charter' for the publication of daily legal data.

Three academic researchers tackle open justice issues in our final section: **Professor Ian Cram** looks at the effect of Twitter on juries; **Dr Lawrence McNamara** considers how the judiciary contributes to legal reform through 'extra-judicial' statements; and **Lucy Series** examines secrecy in the Court of Protection.

The debate continues beyond the pages of this publication, however. We have created a special page on the City University London website to track this project's development<sup>2</sup>, which includes audio from the event and hyperlinks to relevant reports. Please contact us with your own thoughts and experiences, which will feed into our ongoing research and work in this area and our forthcoming recommendations to the Ministry of Justice.

Thank you to Sarah Muzio for administrative help, Oliver O'Callaghan for editing assistance, and Andrew Stuart for photography. I hope you enjoy the papers.

**Judith Townend, May 2012**

*Judith Townend is director of the 'Open Justice in the Digital Era' project and editor of this publication. She is a PhD research student at the Centre for Law, Justice and Journalism, City University London, exploring the effects of libel and privacy law on journalism in the UK.*

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<sup>2</sup> See <<http://www.city.ac.uk/centre-for-law-justice-and-journalism/projects/open-justice-in-the-digital-era>> accessed May 2012

# A GREAT TRADITION OF OPEN JUSTICE

***Geoffrey Robertson QC delivered the keynote speech at the ‘Justice Wide Open’ conference and set out the history of the open justice principle, arguing that the government’s justice and security green paper will not be compliant with our great tradition***

‘Justice must be seen to be done’ is a principle that Britain has contributed to the free world. It was first articulated in 1649 by ‘Freeborn John’ Lilburne, the Leveller, when Cromwell’s judges tried him for treason: they accepted his submission that ‘the first and fundamental liberty of an Englishman’ is that ‘no man whatsoever ought to be tried in holes and corners, or in any place where the gates are shut and barred’.

It is this great open justice tradition, which has made our courts so superior to other legal systems, that Kenneth Clarke is set upon destroying. He plans secret courts, for what his officials admit will be ‘an extremely wide range of civil proceedings’. He is doing this for unworthy reasons – to protect the security services from embarrassment. And he proposes to do it by unworthy means, hiring ‘vetted’ barristers whose private lives and politics will be investigated by the intelligence services they are supposed to oppose.

That the government can contemplate this at all is due to the malign influence of the European Convention on Human Rights. Before it, our law was that laid down by Lord Halsbury: ‘Every court in the land is open to every subject of the King’. European countries were not so fastidious – the Nazis had secret ‘morals courts’ where they persecuted homosexuals, and the Scandinavians were always closing court doors in the interests of privacy. So the European Convention adopted the lowest common denominator, using weasel words that allow courts to be closed in the interests of morality, privacy or national security. Mr Clarke’s green paper is full of boasts that its secret courts will be compliant with the Euroconvention, but it will certainly not be compliant with our open justice tradition. As Jeremy Bentham put it, ‘Publicity is the very soul of justice. It keeps the judge, while trying, under trial’.

Parliament can, of course, legislate to keep certain information from the public, and there are gagging provisions in the Official Secrets Act. But these have been seriously abused in the past. In 1978, for example, the security services wanted to jail two journalists from *Time Out* for revealing the existence of GCHQ (which was then an ‘official secret’). They called a witness whose name they pretended was so secret that it would be a crime to reveal it. But this Colonel, H.A. Johnstone, was so well known that journalists wrote it in the sand at Whitby and when Scotland Yard’s

Special Branch rushed up to arrest them, the high tide had washed it away by the time they arrived. Then an MP (Robert Kilroy-Silk, in his finest hour) said the forbidden name on the floor of the House of Commons, and the Attorney General threatened to prosecute any media organisation – including Hansard – that published it. His bluff was called, but the case shows just how bogus some security service claims can be, and to what extent governments will fall over backwards to accommodate them.

Another example was the attempt to stop the *Mail on Sunday* from reporting how secret files were being kept on many of Blair's cabinet ministers. MI5 applied for an injunction against the newspaper at a judge's home on Saturday afternoon, but the open justice principle meant that this attack on press freedom could at least be reported. Under Ken Clarke's scheme, this civil action would be heard in secret – the effect would be like a super-injunction.

It is usually Labour governments, full of nervous liberals, who give up liberties under pressure from the police or the spooks. Why is a Conservative government abandoning a proud tradition? Partly because of the upcoming cases where MI6 is being sued over its complicity in 'rendering' dissidents to Libya, to be tortured by the brutal Gaddafi regime. The evidence is sensitive because it will be extremely embarrassing, but the public must be entitled to hear it. The government is also under pressure from the US, upset that some of CIA 'torture memos' were disclosed to lawyers for Bin Mohammed. The green paper wrongly claims that there is a 'control principle' that requires Britain never to reveal the secrets supplied to them by other states. In the Bin Mohammed case however, Mort Halperin, a top US national security advisor, explained that the 'control principle' meant only that Britain should do its best to keep US secrets, but would always comply with court orders to disclose them – as would the US if required to disclose ours.

The green paper makes a number of extremely dubious claims. It states that because the government cannot reveal 'sensitive' information, it has to settle cases before they come to trial, and so pays a lot of money to undeserving claimants. I do not believe this is the truth, although it has featured greatly in the rhetoric of Messrs Cameron and Clarke. First and foremost, the government does not settle civil cases because it does not want to expose secret evidence; it settles cases because otherwise it will lose them. It has ample power to keep really secret evidence from disclosure by using a Public Interest Immunity (PII) certificate. And isn't it interesting that whenever the government does settle cases, it is never prepared to tell the public how much taxpayers' money it has thrown away? If Parliament were interested in holding the government to account, it would demand to know how much the government was paying in these secret settlements, and whether taxpayers money was being spent to avoid the public embarrassment of losing in open court.

There is another tradition that Mr Clarke is prepared to destroy in order to make his secret courts work, and that is the independence of the bar. Barristers must

act fearlessly for their clients, and cannot do so if they are not allowed to talk to them. Mr Clarke proposes that ‘sensitive’ information should not be seen by claimants or their lawyers, but only by ‘special advocates’ – barristers allowed into the secret court to represent clients they are not allowed to meet. They are ‘special’ because they have passed security vetting tests which confirm that the security services find them acceptable – to act against the security services!

This vetting may (although I have grave doubts) be acceptable in the narrow context of immigration appeals: to have civil courts that can be entered only by security-cleared barristers who can’t speak to their clients raises serious issues of ethics for a profession that boasts of its independence. When your fee is dependent on a security clearance, can you be perceived as free to act robustly against those on whom your income depends? The Bar should refuse to accept the government’s plan to discriminate in favour of those barristers with an MI6 seal of approval.

Mr Clarke has form, although everyone seems to have forgotten it. Back in 1992, when he was Home Secretary, he was embroiled in the ‘Iraqgate’ scandal: he and several other ministers signed secrecy orders to cover up the fact that the Thatcher government had encouraged the illegal export of bomb-making equipment to Saddam Hussein. Three innocent men were put on trial and might well have been convicted and jailed had Michael Heseltine not had the integrity to blow the whistle. Mr Clarke had put government ‘sensitivities’ i.e. its fear of embarrassment – above the need for justice and above the public interest. That is precisely what he is doing by constructing these secret courts.

**© Geoffrey Robertson QC**

*Geoffrey Robertson is author of ‘Robertson & Nicol on Media Law’, and was defence counsel in the Iraqgate (Matrix Churchill) case.*



# OPEN JUSTICE UNBOUND?

*The Master of the Rolls, **The Right Honourable Lord Neuberger of Abbotsbury**, delivered this paper at the Judicial Studies Board Annual Lecture on 16 March 2011.<sup>1</sup> He explores the fundamental principle of open justice, which is said to underpin the rule of law and our liberal democracy*

We live in a country which is committed to the rule of law. Central to that commitment is that justice is done in public – that what goes on in court and what the courts decide is open to scrutiny. This is not a new fundamental principle. In 1829, for instance, Bayley J in *Daubney v Cooper*<sup>2</sup> said this:

... we are all of opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, – provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, – have a right to be present for the purpose of hearing what is going on.<sup>3</sup>

Of course, it goes back further than that. As one 20th century commentator put it:

[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access ... appears to have been the rule in England from time immemorial.<sup>4</sup>

Time immemorial means, of course, older than 6 July 1189, the date of King Richard I's accession to the throne,<sup>5</sup> although the date is not so much a tribute to him, as to his father, King Henry II, whom he succeeded. So it is a common law principle which stretches back into the common law's earliest period.

The importance of open justice as a fundamental principle has not only secured its place in our legal system. It has also secured its place in the legal systems of all those countries which are signatories to the European Convention on Human

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<sup>1</sup> The author wishes to thank John Sorabji for all his help in preparing the lecture. This lecture also appeared in *The Judicial Review* (2011) 10 TJR 259-276. It is reproduced with the kind permission of the author and the publishers, the Judicial Commission of New South Wales.

<sup>2</sup> (1829) 109 ER 438

<sup>3</sup> *ibid* at 441

<sup>4</sup> E Jenks, *The book of English law*, 6th revised edn, PB Fairest (ed), Murray, London, 1967 at 73–74, cited in *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 566–567. See also JJ Spigelman, 'The principle of open justice: a comparative perspective', paper presented at the Media Law Resource Centre Conference, 20 September 2005, London, at <[www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman200905](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman200905)>, accessed

11 August 2011

<sup>5</sup> Statute of Westminster (1275)

Rights. Article 6 of the convention was specifically drafted<sup>6</sup> to replicate the House of Lords' ringing affirmation of open justice in the seminal early 20th century decision of *Scott v Scott*.<sup>7</sup> In that case, Lord Shaw described how open justice was 'a sound and very sacred part of the constitution of the country and the administration of justice'.<sup>8</sup> The principle is equally embedded into the framework of all common law systems; not least the United States, where, in 1791, it was enshrined as a constitutional right by the Sixth Amendment.<sup>9</sup> It is as important as it is well-travelled and long-lived.

The importance of open justice arises from the role it plays in supporting the rule of law. Public scrutiny of the courts is an essential means by which we ensure that judges do justice according to law, and thereby secure public confidence in the courts and the law. This evening, I would like to focus on three discrete and currently relevant aspects of this constitutional principle.

First, I want to talk about the nature of public judgments: if justice is seen to be done it must be understandable. Judgments must be open not only in the sense of being available to the public, but, so far as possible given the technical and complex nature of much of our law, they must also be clear and easily interpretable by lawyers, and also to non-lawyers. In an age when it seems more likely than ever that citizens will have to represent themselves, this is becoming increasingly important. Second, I want to talk about modern applications, and possible developments, of the principle. In particular, I would like to examine increasing the relevance and accessibility of the justice system to the public. Finally, I want to talk about some recent developments in the application of the principle; in particular, super-injunctions and closed proceedings.

### **Open justice and public judgments**

As the Romans had it, *ignorantia juris haud excusat*, ignorance of the law is no excuse, and that is true both of our criminal law and our civil law. However, if ignorance of the law is ruled out as an excuse, legislators, judges and lawyers owe a concomitant duty to ensure that the law is not so impenetrable or abstruse that even other lawyers and judges are unable to penetrate it. It is for this reason that legislation should be drafted clearly; and why, in recent years, there has been such a sustained and justified outcry at the inexorable volume, the tedious length, and the inept drafting of many of the Acts of Parliament that have found their way onto the statute book.

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<sup>6</sup> European Commission of Human Rights, Preparatory work on Article 6 of the European Convention on Human Rights, Council of Europe, Strasbourg, 8 October 1956 (DH (56) 11), pp 22–23, at <[www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH\(56\)11-EN1338886.PDF](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF)>, accessed 11 August 2011.

<sup>7</sup> [1913] AC 417

<sup>8</sup> *ibid* at 473; compare *AG v Leveiler Magazine Ltd* [1979] AC 440 at 449–450

<sup>9</sup> *Gannett Co Inc v DePasquale* 443 US 368 (1979) at 385, albeit a right of the parties, not of the public.

However, clarity is not just important where legislation is concerned. If the law is to be properly accessible, then the courts are under the same duty of accessibility as is placed on the legislature – above all in a common law system, where, albeit within bounds, the judiciary make and develop the law, as well as interpret it. Oscar Wilde said that truth is ‘rarely pure and never simple’,<sup>10</sup> and the same may be said of the law. However, that is no excuse for judges producing judgments that are readable by few, and comprehensible by fewer still. Indeed, the increasing complexity of the law imposes a greater obligation than ever on judges to make themselves clear.

We can, of course, all think of particularly bad judgments: over-long, meandering, thick with digressions, obiter dicta, and needlessly complex. Not all have the precision of Lord Atkin’s judgment in *Donoghue v Stevenson*.<sup>11</sup>

We might all benefit from reminding ourselves of the clarity with which he identified the issue and set out the principle. First, a crisp statement of the issue, then a tightly drafted consideration of the case law, and, finally, an equally crisp and clear statement of the law:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>12</sup>

The alleged snail may well have been in a ‘dark opaque glass’,<sup>13</sup> but there was nothing dark or opaque about Lord Atkin’s opinion, nor was it too long or discursive: a very model of a modern major judgment.

Judges are faced with choices as to which there is seldom a universally applicable answer. Should my judgment be short and to the point, or long and complete? Should I confine my reasoning to the facts of this case, or try and give guidance for the future? Should I try and reach a fair result in this case or keep the law clear and certain? Let me address those questions.

### **Short or long**

On the face of it, the answer is obvious: judgments should be as short as possible. However, if a judgment is too abbreviated, the judge will risk not considering the issues and previous authorities properly. One of the main points of a judgment is to

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<sup>10</sup> O Wilde, *The importance of being Earnest*, Act 1

<sup>11</sup> [1932] AC 562

<sup>12</sup> *ibid* at 580

<sup>13</sup> *Donoghue v Stevenson*, 1932 SC (HL) 31; see further <[www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson.html](http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson.html)>, accessed 11 August 2011



explain the decision to the parties, especially the loser, to their lawyers and to any appellate court, and more generally to future potential litigants, to their lawyers, as well as to academics. Particularly in our common law precedent-based system, judges often should refer to and consider past decisions. So the shorter the better, but, as with anything, you can have too much of a good thing.

A prime example of brevity can be found in many judgments of one of my particularly formidable predecessors, Sir George Jessel MR. A good instance of his style can be found in a decision he gave in 1879, *Henty v Schroder*.<sup>14</sup> An order for specific performance of an agreement for the purchase of an estate had been made, at the suit of the plaintiff contracting vendor. However, the defendant purchasers failed to complete. The vendor then applied to have the agreement rescinded, and an assessment of damages, relying on three previous judgments. Sir George took less than eight lines in the law reports to analyse the law and reach his conclusion:

[He] considered that the Plaintiffs could not at the same time obtain an order to have the agreement rescinded and claim damages against the Defendant for the breach of the agreement. His Lordship declined to make an order in the form [approved in the three previous judgments] and only ordered that the agreement should be rescinded; that all other proceedings in the action should be stayed; and that the Defendant should pay the Plaintiffs' costs.<sup>15</sup>

Sir George Jessel was a titan of the law, and not without confidence. It is said that when his colleague in the Court of Appeal, James LJ, asked him whether it was true that he had said 'I may be wrong, but I am never in doubt', he replied: 'very true, except I never said "I may be wrong"'. Perhaps that explains the concision of his judgment; his ability to despatch three prior precedents without any consideration; and his ability to set out a principle which every Chancery judge and practitioner accepted for the next 100 years. Perhaps all that explains why, unfortunately, his decision was utterly wrong. However, it took the House of Lords to say so in *Johnson v Agnew*<sup>16</sup> a full century later.

Although the judgment in *Henty* is immediately accessible to anyone reading it, it was given without careful analysis of the law and without due consideration of the authorities. Perhaps if Sir George had given the point more consideration and had set out his reasons properly, he would have seen the error of his ways, and, if that is too much to ask, then perhaps a considered judgment, setting out his reasons for holding as he did would have resulted in his error coming to light earlier than 1980.

Brevity is important, but clarity is more important, and, as the law, reflecting society as well as legislation, becomes ever more complicated, the duty of judges to

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<sup>14</sup> (1879) 12 Ch D 666

<sup>15</sup> *ibid* at 667

<sup>16</sup> [1980] AC 367

communicate the law through their judgments as clearly as possible becomes ever more important.

### **Confined reasons or general guidance**

Particularly if a case comes to the Court of Appeal (England and Wales) or, even more, to the Supreme Court (UK) (which only takes cases of general public importance), it can be said that the public has a right to expect general guidance to be given. In some cases, the courts cannot duck a general principle, as often happens when they are called on to interpret a statute. In other cases, because it is the function of the courts to develop the common law, it is necessary to address a very wide-ranging point, as in *Donoghue* itself. However, the courts are inevitably hampered by being limited to the facts of the particular case. They cannot envisage every eventuality, and they do not have the same access to information, statistics, interested parties, organisations and pressure groups as the legislature. So generalising can be dangerous.

There is no doubt that, in some areas, there is much to be said for letting the law develop on a case-by-case basis, even though it risks leaving potential litigants in a state of uncertainty. Indeed, it is interesting to note that, in recent times, the House of Lords seems to be keen on the idea that the extent of the scope of duty of care, the very topic which *Donoghue* was concerned with, should be developed on a case-by-case basis, as stated by Lord Bridge in *Caparo Industries Plc v Dickman*.<sup>17</sup> That may be because the House of Lords took the law too far in *Anns v London Borough of Merton*,<sup>18</sup> from which the Privy Council, in *Yuen Kun Yeu v A-G (HK)*,<sup>19</sup> and then the House of Lords in *Caparo* famously retreated.

An example of the dangers of using a case to lay down general principles is to be found in a Court of Appeal case decided 35 years ago. In *Re Hastings Bass*,<sup>20</sup> a principle was set up that was only laid to rest (subject to the Supreme Court) last week by the Court of Appeal in a magisterial judgment in a case called *Pitt v Holt*.<sup>21</sup> It might be thought that the 239 paragraphs in *Pitt* would offend the principle that judgments should be readily accessible. In some cases such a criticism would have real force. In this case though, such length was a necessary curative. For the last 20 years, following on from the case of *Mettoy Pension Trustees Ltd v Evans*,<sup>22</sup> as Lloyd LJ put it in *Pitt*:

... a principle, described as the rule in *Re Hastings-Bass*, has been developed... [that principle] is that the exercise of a discretionary dispositive power by trustees may be

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<sup>17</sup> [1990] 2 AC 605 at 618

<sup>18</sup> [1978] AC 728

<sup>19</sup> 18 [1988] AC 175

<sup>20</sup> [1975] Ch 25

<sup>21</sup> [2011] EWCA Civ 197

<sup>22</sup> [1990] 1 WLR 1587

declared void and set aside, even many years after the event, on the basis that the trustees failed to take into account relevant matters when exercising the power.<sup>23</sup>

In the course of his judgment in *Hastings-Bass*, Buckley LJ summarised part of his reasoning by reference to some general propositions, no doubt with a view to laying down principles to assist lawyers and other advising trustees and beneficiaries. One of those general principles has formed the cornerstone of an entire edifice of the law,<sup>24</sup> but it was a cornerstone placed on sand. In the context of the case before him, Buckley LJ's summary seemed unexceptionable, but, as the Court of Appeal has held in *Pitt*, it was far too broadly, and therefore erroneously, expressed.

It may yet be the case that the Supreme Court (UK) will be asked to consider whether the rule is indeed a rule, depending on whether an appeal is brought from the Court of Appeal's decision in *Pitt*. However, the point for today's purpose is straightforward. Too broad an expression of a principle in a judgment led the law down an erroneous byway for over a third of a century – and deprived the Revenue of a great deal of money on the way. To characterise an issue as 'justice or the law?' might seem a solecism, and I suppose it is. Justice in a particular case is a decision according to the law. However, the question poses in useful shorthand the question how far a judge should go to refashion the law to produce what most people would regard as a fair result in a particular case. Professor Dworkin famously compared the role of a common law judge with that of a scriptwriter engaged to write an episode of a well-established soap opera: he is fixed with the story so far, but is otherwise free to develop it as he thinks fit.

Just as the scriptwriter has to think of not merely what seems to him to be a good story, but also how to keep the audience satisfied, so must a judge think not merely of the case and the parties in front of him, but also of the countless potential litigants and their advisers, who will read his judgment, and seek to rely on it. Certainty and simplicity are, in that connection, I would suggest, more important than getting a fair answer in a particular case. That is, of course, not a new idea: it is what is embodied in the dictum that hard cases make bad law, because, as somebody once put it, bad law makes hard cases.

Sometimes, however, one does get a difficult case where principle is made to yield to justice. A well-known example is *White v Jones*,<sup>25</sup> where, by a bare majority of three to two, the House of Lords held that someone who would have been a beneficiary under a will, which was not properly executed due to the negligence of the deceased's solicitor, could claim damages from the negligent solicitor. The fairness of this conclusion to the average person may seem clear, not least because otherwise the negligent solicitor gets away with it and the intended beneficiary is out of pocket. However, the extent to which the decision conflicts with principle is clear

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<sup>23</sup> [2011] EWCA Civ 197 at [3]

<sup>24</sup> See *Re Hastings Bass* [1975] Ch 25 at 41F–H

<sup>25</sup> [1995] 2 AC 207

from the masterly dissenting opinion of Lord Mustill, and, some might say, from the rather tortured reasoning of the leading majority opinion of Lord Goff.

I am something of an agnostic about the actual decision in *White*, but I think it would have done the common law and its reputation much more favour if the House of Lords had based its conclusion on the simple proposition that there are exceptions to every principle, rather than unconvincingly seeking to suggest that the decision accorded with established principles. After all, the common law is ultimately based on pragmatism, so one should not be surprised if there are exceptions to most of the rules it has developed. Nonetheless, we judges should avoid tailored exceptions to, or dubious extensions of, established principles, simply in order to achieve what may be regarded as a fair result in the particular case.

That leads to my final specific point on clarity in judgment writing – the vexed question of the desirability of a single composite judgment in appellate courts. The desire to write your own judgment, particularly in an interesting and important case, can be quite considerable. The wish is reinforced where, as often happens, you think you can write an even better judgment than the one your colleague has produced. Virtually every appellate judge has been guilty of what might be called a vanity judgment: I certainly have.

In some types of case, it is important to have a single judgment giving clear guidance, thereby avoiding any possibility of arguments as to whether two slightly differently expressed judgments mean the same thing. I was recently involved in a case in the Supreme Court (UK),<sup>26</sup> where we were anxious to ensure that judges in the County Courts had clear guidance as to how to apply Art 8 of the European Convention to residential possession actions. Lord Phillips PSC was anxious that there was only one judgment, given the importance of clear guidance in such a case. Although it went out in my name, the contributions to the judgment of the other eight members of the court were substantial, in some cases very substantial. It was hard work, involving a number of meetings and a great deal of email communication, but the result was much better than my original draft. Whether it achieved its aim only other people and time can tell.

I am very far from suggesting that we should entirely move away from multiple judgments. Sometimes the different judicial perspectives, even though the judges may agree on the actual outcome, render a single judgment impossible or would result in the unsatisfactory compromise product that we sometimes see emanating from Luxembourg or Strasbourg – very limited in effect, banal, opaque, or internally inconsistent. Sometimes, a short concurring judgment, more ‘punchy’ than the fuller leading judgment, helps identify the main points and the main thrust of the reasoning of the court. Sometimes, a second concurring judgment adds an extra dimension to the first, often because the two judges come at the issue from different angles or with different experiences or expertise. Sometimes, where the law is being

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<sup>26</sup> *Pinnock v Manchester City Council* [2010] 3 WLR 1441

taken forward or expanded, it is positively useful to have judgments with different emphases, or adopting slightly different approaches. That is how the common law develops.

In conclusion on this aspect, I would have thought then that one of the things which the Judicial Studies Board, the soon-to-be Judicial College, should consider as a topic is the skill of judgment writing. In saying this, I intentionally express myself in somewhat tentative language. Judgment writing is a very individualistic exercise, which is governed by the style and approach of the judge and the issues and character of the case. Unlike a summing-up, one cannot have standard passages which can be lifted from a bench book. Accordingly, there may be a limited amount one could usefully teach on the topic. Some might go so far as to say that anyone who needs to be taught how to write a judgment is unfit to be a judge.

I accept that there is some force in all these points, but, in the end, I do not agree with the conclusion. Advocacy is taught, and that is every bit as much a personal, case-based art. There is always something which even an experienced judge can learn about judgment writing, as anyone who has sat in the Court of Appeal can testify. When I receive a colleague's draft judgment, I often not only consider the reasoning and conclusion of the draft, but also realise that the approach, style or structure is different from that which I would have adopted, and, at least sometimes, I really think I learn from it.

### **Open justice in the future**

Clarity and accessibility in judgments is one way in which we can continue to secure open justice in the 21st century. However, there are other measures we could adopt to ensure our courts remain properly accessible. I started this lecture with Bayley J's thoughts as to the practical and principled limitations on public access to the courts. The practical limitations are twofold – lack of space in court, and disruption to the proceedings. The principled limitation is that there may be a good reason owing to the nature of the case that the public are denied access. For the moment I concentrate on the practical limitations.

The fact that the court may be too small to accommodate all those who wish to attend the hearing is recognised by the Civil Procedure Rules (England and Wales), which do not place a positive obligation to provide sufficient access to the courtroom to all those who wish to observe proceedings.<sup>27</sup> Newly built courtrooms are mostly smaller than the old ones. However, it is only on rare occasions that our courts are full of members of the public. The days of courts regularly being filled to the rafters by interested members of the public, as Dickens depicted during Charles Darnay's trial in *A Tale of Two Cities*, are long gone. The combination of limited space and limited interest among the public suggests that the justice system may need to adapt in order to ensure that it truly remains open to the public.

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<sup>27</sup> Civil Procedure Rules (England and Wales) (CPR), r 39.2(2)

Public awareness of what happens in our courts serves to bolster public confidence in the administration of justice. Providing fair trials in the public eye bolsters public confidence in the administration of justice, and hence in our democratic form of government. It is therefore a matter of concern if members of the public rarely come into our courts to observe what goes on in them. Stating that our courts, as a general principle, are open to all is one thing, but it must be a reality.

The decrease in members of the public coming to visit the courts since Dickens's day is attributable, at least to a substantial extent, to generic factors. The vast quantity of entertainment now available at home, and the opportunities of travelling whether in the United Kingdom or abroad, mean that there are many more distractions available than 150 years ago. The increased tempo of life has, I think, resulted in a shorter attention span, a greater desire for instant gratification, which the court process cannot satisfy – and, ironically, over the same period, court hearings have generally become much slower and longer.

So there is a limited amount we can do to seek engage the public, and, anyway, we should be careful of taking any such steps. It is not the function of the courts or the judges to adjust their procedures or working practices with a view to stimulating public interest, let alone to curry favour with the public. However, we have to be open to the public, and, I would suggest, we have to do everything reasonably practical to enable the public to have access to see what is going on in court, provided that it does not interfere with the trial process.

The Supreme Court televises its hearings in its impressively renovated building. As yet, though, there appears to have been little appetite for broadcasters to televise its hearings. I can see that there may not, from a commercial perspective, be an interest to do so. However, from a public interest perspective might there not be an argument now for its hearings, and some hearings of the Court of Appeal, to be televised on some equivalent of the Parliament Channel, or via the BBC iPlayer? Brazil's Federal Supreme Tribunal now has its own TV channel. The channel, TV Justiça, does not only show recordings of its sessions, but it also shows a whole host of educational programs about the justice system.

If we wish to increase public confidence in the justice system, transparency and engagement, there is undoubtedly something to be said for televising some hearings, provided that there are proper safeguards to ensure that this increased access does not undermine the proper administration of justice. Such an idea would have to be looked at very carefully, and it would not be sensible for me to try and make any firm suggestions. However, if broadcasting of court proceedings does go ahead, I think it would be right to make two points, even at this tentative stage. First, the judge or judges hearing the case concerned would have to have full rights of veto over what could be broadcast. Second, I would be very chary indeed about the notion of witness actions or criminal trials being broadcast – in each case for obvious reasons.

It is not merely the television age we have entered. I welcome the Lord Chief Justice's *Interim Guidance on Tweeting in Courts*.<sup>28</sup> Without wanting to prejudge the contents of the *Final Guidance*, it seems to me that, subject again to proper safeguards, the advent of court tweeting should be accepted, provided of course that the tweeting does not interfere with the hearing. Why force a journalist or a member of the public to rush out of court in order to telephone or text the contents of his notes written in court, when he can tweet as unobtrusively as he can write? It seems to me, in principle, that tweeting is an excellent way to inform and engage interested members of the public, as well as the legal profession. Whatever the outcome of the consultation is, I doubt that we will see the development of tweeting from the Bench.

The media have always played a fundamental role in reporting what goes on in the courts, and, with the fall-off in public attendance in the courts, and the increased role of the broadcast media, accurate press reporting is even more important to open justice than it was in Dickens's time. One of the most fertile grounds for inaccurate reporting is the *Human Rights Act* 1998; reporting which may tempt some into thinking that it is hardly worth maintaining the State's inability to deny you a fair trial, to kill or torture you, and to preclude you enjoying freedom of expression.

There are many examples of inaccurate reporting; I shall limit myself to two. In May 2006, *The Sun* reported that 'Serial killer, Dennis Nilsen, 60, received hardcore gay porn in jail thanks to human rights laws'.<sup>29</sup> He had indeed issued proceedings based on human rights seeking the provision of such pornography. However, as the Joint Committee on Human Rights, in its 2006 report pointed out, the claim was thrown out at the permission stage;<sup>30</sup> that is to say immediately. If Mr Nilsen ended up being provided with what he wanted, and I don't know whether he did or not, it had absolutely nothing to do with human rights laws.

My second example relates to the reporting of the issue of the attempted deportation of Learco Chindamo, who killed Philip Lawrence, from the United Kingdom. He could not be deported, and, for some parts of the press, this was entirely the fault of Art 8 of the European convention.<sup>31</sup> Although the Tribunal which

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<sup>28</sup> Lord Judge, Lord Chief Justice of England and Wales, Interim practice guidance: the use of live text-based forms of communication (including twitter) from court for the purposes of fair and accurate reporting, 20 December 2010, at <[www.judiciary.gov.uk/publicationsand-reports/guidance/lcj-interim-pracr-guide-text-based-comms-20122010](http://www.judiciary.gov.uk/publicationsand-reports/guidance/lcj-interim-pracr-guide-text-based-comms-20122010)>, accessed 11 August 2011

<sup>29</sup> O Harvey and M Lea, '35,000 back Sun on rights', *The Sun*, 13 May 2006

<sup>30</sup> House of Lords and House of Commons Joint Committee on Human Rights, *The Human Rights Act: the DCA and Home Office Reviews*, 32nd Report of Session 2005–06, HL Paper 278, HC 1716, 14 November 2006, p 24, at <[www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf](http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf)>, accessed 11 August 2011

<sup>31</sup> C Hope, 'Learco Chindamo: the deportation debate', *The Telegraph*, 23 August 2007, at <[www.telegraph.co.uk/news/uknews/1561081/Learco-Chindamo-The-deportation-debate.html](http://www.telegraph.co.uk/news/uknews/1561081/Learco-Chindamo-The-deportation-debate.html)>, accessed 11 August 2011; A France, 'Head's evil killer freed', *The Sun*, 19 July 2010, at <[www.thesun.co.uk/sol/homepage/news/3059360/Killer-Learco-Chindamo-freedom-licence-from-jail.html](http://www.thesun.co.uk/sol/homepage/news/3059360/Killer-Learco-Chindamo-freedom-licence-from-jail.html)>, accessed 11 August 2011; S Wright, 'He always swore he'd spend his life atoning': widow's anguish as man who stabbed headmaster is arrested over street robbery after four months' freedom', *Mail Online*, 25 November 2010, at <[www](http://www)>.

made the initial deportation ruling mentioned Art 8, the reason why he could not be deported had, however, nothing whatsoever to do with Art 8, but was based on the *Immigration (European Economic Area) Regulations 2006*.<sup>32</sup> (So I suppose it was the fault of Brussels or Luxemburg, but not Strasbourg.)

These are just two examples, and the Joint Committee 2006 report outlines a number of other myths and misconceptions. These myths are attributable to two different tendencies. The first is simply outright misreporting. The story said one thing, when the truth was the opposite. The second is a more subtle form of misreporting: the *Human Rights Act* is brought in to take the blame for a decision to which it might have played a part – and the part the critics suggested it did play, but which in truth it did not.

It is a sign of a healthy democracy that there are different views within society and that the outcome of individual cases, and the balance struck between individual rights, can be vigorously debated. However, such debates must be based on fact not misconception, deliberate or otherwise. Persuasion should be based on truth rather than propaganda. It is one thing to disagree with a judgment, to disagree with a law and to campaign to change the law, but it is another thing to misstate what was said in a judgment, or to misstate the law.

I think that a more active approach might usefully be taken by those of us who are concerned with the administration of justice to ensure that judgments are publicised and properly reported. We should:

- build on the Supreme Court's practice of issuing short, easily accessible judgment summaries with judgments
- foster the already developing community of active informed court reporting on the internet through blogs, and tweeting
- support the responsible legal journalists
- initiate, support, encourage and assist public legal education.

The great strength of our society is that it is built on the competing voices of free speech. Justice to be truly open must join its voice to the chorus; and must ensure that inaccurate or misleading reporting cannot gain traction.

It is this point though which brings me to the final part of this lecture. How far does principle allow us to go in the direction of openness?

### **Recent developments in cases on open justice**

There have been two recent developments which have called into question the boundaries of open justice. They concern Bayley J's second limiting factor: the

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[dailymail.co.uk/news/article-1332790/Widows-anguish-Philip-Lawrences-killer-Learco-Chindamo-arrested-robbery.html](http://dailymail.co.uk/news/article-1332790/Widows-anguish-Philip-Lawrences-killer-Learco-Chindamo-arrested-robbery.html)>, accessed 11 August 2011

<sup>32</sup><[www.docstoc.com/docs/27908859/LEARCO-CHINDAMO-v-SECRETARY-OF-STATE](http://www.docstoc.com/docs/27908859/LEARCO-CHINDAMO-v-SECRETARY-OF-STATE)>, accessed 25 August 2011



existence of specific reasons of principle why the public should properly be excluded. The first is the development of the so-called superinjunction. The second is the development of closed proceedings where national security issues arise.

A super-injunction is simply an interim injunction whose purpose is to restrain a person from publishing information which the claimant contends is private or confidential in nature. Traditionally, the most common example of such an injunction was to protect commercial secrets. What makes an injunction a super-injunction is that it also restrains publication of the fact that the injunction has been sought and made and the very fact that proceedings are ongoing.<sup>33</sup> Such injunctions can obviously only be granted where there is information which is capable of being legally protected.

Super-injunctions like any other injunction can only be granted in support of substantive legal rights. They do not determine those rights. They simply exist, as all interim injunctions do, to ensure that the proper administration of justice is not frustrated pending trial and final judgment.

For instance, if a claimant is entitled to an injunction restraining publication of a story that he (and it almost always is 'he') has had a sexual relationship with a third party, then it would be literally absurd if open justice prevented him from stopping the press reporting that he had obtained an injunction restraining publication of a story that he had had such a relationship. Thus, once one accepts that the court has power to grant an injunction restraining a breach of privacy, it has to follow that the court has the ancillary power to restrain publication of details of the injunction proceedings, application, hearing, proceedings or order.

The concern over super-injunctions is that they have, as Professor Zuckerman has put it, developed into an entirely secret form of procedure. As he put it, 'English administration of justice has not [previously] allowed',<sup>34</sup> that is:

... for the entire legal process to be conducted out of the public view and for its very existence to be kept permanently secret under pain of contempt.<sup>35</sup>

English law has not known of such a procedure – of secret justice – since 5 July 1641, when the Long Parliament abolished the Court of Star Chamber.<sup>36</sup>

This concern is reflected in the proposition recently spelled out by the Vice-President of the Court of Appeal (Civil Division), Maurice Kay LJ, that 'the principle of open justice requires that any restrictions are the least that can be imposed

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<sup>33</sup> *Gray v UVW* [2010] EWHC 2367 (QB) at [19]; *Ntuli v Donald* [2010] EWCA Civ 1276 at [43]ff

<sup>34</sup> A Zuckerman, 'Super injunctions — curiosity-suppressant orders undermine the rule of law' (2010) 29(2) CJQ 131 at 134

<sup>35</sup> *ibid*

<sup>36</sup> 'An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber', 5 July 1641: Statutes of the Realm, Vol 5: 1628–80, at <[www.british-history.ac.uk/report.aspx?compid=47193](http://www.british-history.ac.uk/report.aspx?compid=47193)>, accessed 25 August 2011.

consistent with the protection to which [the claimant] is entitled'.<sup>37</sup> Even more recently in *JIH v News Group Newspapers Ltd*,<sup>38</sup> the Vice-President, Smith LJ and I set out 10 important items of principle and practice, based on those identified by Tugendhat J, with a view to minimising the inroads made on open justice when there is a need for some sort of reporting restrictions, whether it is the grant of anonymity to parties, limiting or excluding the reporting of the subject matter of the case, or other limitations.

The case involved the grant of an injunction restraining the publication of alleged sexual activity of an international sportsman. The issue was whether we should let the name of the sportsman be published, in which case we would have had to ban publication of details of the story; or grant the sportsman anonymity, in which case the basic nature of the story could be published. Partly because, in the light of the history, naming the sportsman might well have enabled people to work out the nature of the story, we decided to grant him anonymity. However, this was also arguably justified by the point that the public interest is better served by knowing about the type of case which is coming before the courts, and the types of case in which reporting restrictions are being granted, than by knowing which famous sportsman is seeking an injunction for wholly unspecified relief. In this connection, there may well be a difference between what is in the public interest to know and what the public want to know – or perhaps what some newspapers want the public to want to know.

The judicial concern to maximise openness of justice was reinforced by the judgment of the Lord Chief Justice in *A v Independent News & Media Ltd*,<sup>39</sup> where he affirmed in clear terms the right of the media to attend a case before the Court of Protection, albeit that, in order to protect the interests of the disabled person concerned, the media could only report on what was said in court to the extent permitted by the judge hearing the case. I am currently chairing a committee on super-injunctions, and it includes judges, barristers, and solicitors representing both the press and claimants. I very much hope that we will be able to publish our report before the end of April, and that it will allay many of the understandable concerns about secret justice.<sup>40</sup>

That concern also arises in respect of the development of closed proceedings in the justice system and the use of special advocates. Closed proceedings are those

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<sup>37</sup> *Ntuli v Donald* [2010] EWCA Civ 1276 at [54]

<sup>38</sup> [2011] EWCA Civ 42 at [21]

<sup>39</sup> [2010] EWCA Civ 343

<sup>40</sup> The report has since been released: the Master of the Rolls' Committee on Super-Injunctions, Super-Injunctions, Anonymised Injunctions and Open Justice, Report of the Committee on Super-Injunctions, May 2011, at <[www.judiciary.gov.uk/publications-and-reports/reports/civil/committee-reports-super-injunctions](http://www.judiciary.gov.uk/publications-and-reports/reports/civil/committee-reports-super-injunctions)>, accessed 11 August 2011. The Master of the Rolls has now issued Practice Guidance: Interim Non-Disclosure Orders and a Practice Direction on data collection (effective 1 August 2011), at <[www.judiciary.gov.uk/publications-and-reports/guidance/2011/super-injunction-and-anonymised-inj-data-collection-and-guidance-non-disclosure-inj](http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/super-injunction-and-anonymised-inj-data-collection-and-guidance-non-disclosure-inj)>, accessed 25 August 2011

to which not merely the public has no access, but also to which one of the parties has no access. That party will have his own advocates, but they cannot attend the closed proceedings or see the closed evidence, as they cannot have secrets from their client. Special advocates are not instructed by the party concerned, and normally have no contact with him, so they can attend the closed hearing, see the closed evidence, and make such representations as they think appropriate on his behalf. Their purpose is to ensure a degree of procedural justice, or at least to minimise the injustice, to that party.

Closed proceedings were first introduced as a result of reforms made to the immigration system in 1973. Those reforms introduced a system of statutory appeals in deportation cases, except where national security was in issue. In those cases, a right of appeal from the deportation decision lay to a special Home Office Advisory Panel. That panel had access to all the evidence, including the national security evidence. The appellant however did not. The panel made recommendations to the Home Secretary, who could accept or reject them. A challenge to the Home Secretary's decision could then be made by way of judicial review. The court, however, had no jurisdiction to examine the national security evidence.

This system was challenged in a case which was ultimately resolved by the Strasbourg Court in *Chahal v UK*.<sup>41</sup> As a consequence of its decision and one of the Luxembourg Court,<sup>42</sup> the system was reformed. Those reforms saw the creation of *Special Immigration Appeals Commission Act 1997* (UK) which created both the Special Immigration Appeals Commission (SIAC) in 1997 and the special advocate system, which operated in proceedings before SIAC.

Since then, statute has provided for closed proceedings, and the use of special advocates, in six different types of cases; most specifically in respect of court review of control orders.<sup>43</sup> The creation of closed proceedings, notwithstanding the use of special advocates, is a clear derogation from the principle of open justice. Not only is one party absent from one part of the proceedings, but equally the public are barred from having access to it. They are statutory derogations from the principle of open justice. Pending the decision of the Supreme Court, the position is that at common law there is no jurisdiction to create such a procedure, following the *Al-Rawi*<sup>44</sup>

<sup>41</sup> (1996) 23 EHRR 413 at [130]; JUSTICE (UK), Secret Evidence, Report, June 2009 at [81]

<sup>42</sup> *Chahal v UK* (1996) 23 EHRR 413 at [143]; *R v Secretary of State for the Home Department Ex p Shingara and Radiom* [1997] 1 ECR I-3343

<sup>43</sup> Terrorism Act 2000 (UK), s 5, Sch 3, para 5(4), Sch 5(4); Proscribed Organisations Appeal Commission (Procedure) Rules (UK) (SI 1286 of 2007); The Race Relations Act 1976 (UK), as amended by the Race Relations (Amendment) Act 2000 (UK), s 67A(2); Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (UK) (SI 1861 of 2004); Anti-Terrorism, Crime and Security Act 2001 (UK), ss 64, 70 and Sch 6; Pathogens Access Appeals Commission (Procedure) Rules 2002 (UK); Planning and Compulsory Purchase Act 2004 (UK), which amended the Town and Country Planning Act 1990 (UK), s 321; Criminal Justice Act 2003 (UK); *Roberts v Parole Board* [2005] 2 AC 738 at, for example, [83]; Prevention of Terrorism Act 2005 (UK), ss 2 and 10 and CPR 76; Counter-Terrorism Act 2008 (UK), s 68 and CPR 79

<sup>44</sup> *Al-Rawi v Security Service* [2010] EWCA Civ 482

decision to which I was a party in the Court of Appeal, and in respect of which the Supreme Court has heard argument on appeal.

One of the functions of open justice is to guard against repression. Carrying out justice in the light of day ensures that courts do not become, as they did in the case of the Star Chamber, political courts or courts where *lettres d'cachet* are given the imprimatur of justice. However, as we emphasised in *Al-Rawi*,<sup>45</sup> it is obviously open to the Parliament, if and when it thinks fit, to legislate for an appropriate closed procedure in cases in which it believes it to be appropriate and necessary. The Strasbourg court has decided that, subject to the measure being reasonably necessary and the procedure adopted being appropriate, no problem under Art 6 will arise.

The development of both closed proceedings and the debate regarding super-injunctions highlights a number of things. First, the disquiet about both demonstrates how deeply ingrained is our commitment, as a society, to open justice. It underlines Lord Shaw's point that open justice is a sacred part of our constitution and our administration of justice. However, it also shows something else. It highlights how, in certain, narrowly defined circumstances, the general principle can, indeed must, be set aside and how in some circumstances both Parliament and the courts have done so.

It can be set aside because open justice is subject to a higher principle: that being, as Lord Haldane LC put it in *Scott v Scott*, the 'yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done'.<sup>46</sup> Where publicity, through the unqualified adherence to the general principle of open justice, would 'frustrate or render impracticable the administration of justice',<sup>47</sup> then publicity must yield. As mentioned, an injunction protecting information pending trial would be pointless if the very information to be protected had to be disclosed publicly in order to obtain the injunction, and national security might be endangered if certain information had to be disclosed in open court. Open justice must however yield no more than strictly necessary to secure the achievement of the proper administration of justice. Where it goes beyond what is strictly necessary then we run the risk that the courts are no longer open to proper scrutiny, that their role in supporting democracy and the rule of law is undermined.

## Conclusion

This evening I have touched on a number of aspects of the principle of open justice. It is a cardinal principle of our justice system. It underpins the rule of law and our liberal democracy. It is a principle which requires the courts to engage with the public.

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<sup>45</sup> *ibid* at [70] (c)

<sup>46</sup> [1913] AC 417 at 437

<sup>47</sup> *A-G v Leveller Magazine Ltd* [1979] AC 440 at 450

It is not however an absolute principle. It has limits and allows for derogations. In particular it is limited by the need to ensure that it does not undermine the proper administration of justice. An absolutist stance would undermine our justice system. In approaching our commitment to open justice it seems then to me that we need to ask ourselves one question: to what extent does our commitment to it secure the rule of law?

The role of judges and the courts in administering open justice was well described by one of my predecessors, Lord Donaldson. The judges, he said:

... administer justice in the Queen's name on behalf of the whole community. No one is more entitled than a member of the general public to see for himself that justice is done. Nevertheless it is well settled that occasions can arise when it becomes the duty of the court to close its doors.<sup>48</sup>

If those doors are too often closed we undermine justice. If they are not closed when it is appropriate to do so, we equally undermine justice. Amidst this clash of arms, it is justice, the rule of law, which must be our guide.

### © The Right Honourable Lord Neuberger

*The Master of the Rolls is the Head of Civil Justice, and the second most senior judicial post in England and Wales, after the Lord Chief Justice. The Rt. Hon. Lord Neuberger of Abbotsbury (in the county of Dorset) was appointed as Master of the Rolls with effect from 1 October 2009.*

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<sup>48</sup> *R v Chief Registrar of Friendly Societies Ex p New Cross Building Society* [1984] QB 227 at 235

# JUSTICE IN A COLD CLIMATE

*Dr David Goldberg looks to Sweden and Scotland for historical and comparative examples of open justice*

The title of this paper is a play on the title of an article written by the eminent jurist H. L. A. Hart, 'Law in a Cold Climate'. Hart's article was about the school of jurisprudence known as Scandinavian Legal Realism. This paper has no pretensions to jurisprudential import. Its ambition is limited to offering a couple of illustrations concerning 'open justice' from a comparative, historical perspective. The 'cold climate' is a reference to the fact that one example is drawn from Scotland and the other from Sweden.

## Scotland

The principle of open justice in that country is not a recent development. Two statutes of the (pre-1707) Scottish Parliament are illustrative. The second is still considered as being in force.

### a. Evidence Act appointing publication of the testimonies of witnesses<sup>1</sup>

Our sovereign lord, considering how much it does import and concern the good and interest of his majesty's lieges, and the due administration of justice, that witnesses be distinctly and fully examined, and their depositions written in plain and clear words as they are given; therefore his majesty, with advice and consent of the estates of parliament, statutes and ordains that, in all processes presently depending or to be intended before the lords of privy council, lords of session and all other judges within this kingdom, the witnesses who are made use of and adduced therein shall be examined in the presence of the parties or their advocates, they being present at the diets of examination, and that there be publication of the testimonies of the witnesses in the clerks' hands allowed to the parties gratis before advising, to the effect parties may have copies thereof if they think fit, any law or act of parliament, custom or usage to the contrary notwithstanding.

### b. Court of Session Act anent advising with open doors before the session<sup>2</sup>

Our sovereign lord and lady the king and queen's majesties, considering that the advising of causes with open doors is usual in the sovereign judicatories of other nations, and that the like practice here will be of advantage to the lieges, do, with advice and consent of the estates of parliament, statute and ordain that in all time coming, all bills, reports, debates, probations and others relating to processes shall be considered, reasoned, advised and voted by the lords of session with open doors,

<sup>1</sup> Evidence Act, APS viii 599, c.30 <<http://www.rps.ac.uk/trans/1686/4/46>> accessed 3 March 2012

<sup>2</sup> Court of Session Act, APS ix 305, c.42 <<http://www.rps.ac.uk/trans/1693/4/93>> accessed 3 March 2012

where parties, procurators and all others are hereby allowed to be present, as they used to be formerly in time of debates, but with this restriction, that in some special cases the said lords shall be allowed to cause remove all persons, except the parties and their procurators, and that no person presume to speak after the lords begin to advise under the pain of imprisonment, unless he be desired by the lords. And hereby cass and annul all former laws and acts of parliament appointing or allowing the lords to advise with closed doors.<sup>3</sup>

Also worthy of note is the dictum of Lord President Inglis in *Richardson v Wilson* (1879), regarding the right of newspapers to be in court to report proceedings. He stated that

The publication by newspapers of what takes place in court at the hearing of any cause is undoubtedly lawful: and if it be reported in a fair and faithful manner the publisher is not responsible though the report contain statements or details of evidence affecting the character of either of the parties or of other persons; and whatever takes place in open court falls under the same rule, though it may be either before or after the proper hearing of the cause. *The principle on which this rule is founded seems to be that, as courts of Justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished without inferring any responsibility.* [Emphasis added]

## Sweden

Probably, most would not be surprised to learn that Sweden has a tradition of ‘open justice’. However, historically, the main tack adopted with respect to ‘open justice’ in that jurisdiction has been rather distinctive. The key development took place during the so-called Age of Liberty, 1720 – 1772.<sup>4</sup>

Whilst largely connected with political liberty – principally the rise of the four Estates (jointly, the Parliament/Riksdag) vis-à-vis the Monarchy – the period did also see increasing demands for civil liberty.

A representative sentiment from a little-known source is that expressed by the world-renowned botanist and apostle of von Linne, Peter Forsskal. Almost unknown is the fact that he also authored a controversial pamphlet, *Thoughts on Civil Liberty* (1759).<sup>5</sup> Committed to openness in the broader context of social and scientific progress, Forsskal wrote:

So, the life and strength of civil liberty consist in limited Government and unlimited freedom of the written word...

....it is also an important right in a free society to be freely allowed to contribute to society’s well-being. However, if that is to occur, it must be possible for society’s state

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<sup>3</sup> ‘Cass’ means ‘To make void, render ineffective, annul or disable’

<<http://www.rps.ac.uk/static/glossary.html#C>> accessed 3 March 2012

<sup>4</sup> Michael Roberts *The Age of Liberty: Sweden 1719-1772* (Cambridge University Press 2003)

<sup>5</sup> <<http://peterforsskal.com/node/25/#main-text>> accessed 9 March 2012; the printed copy of the text with commentary is available at <<http://www.peterforsskal.com/buy>> accessed 9 March 2012

of affairs to become known to everyone, and it must be possible for everyone to speak his mind freely about it. Where this is lacking, liberty is not worth its name.<sup>6</sup>

The pamphlet was banned on the day it was published. This helped fuel the gathering firestorm that led, ultimately, to the passage of the ‘world’s first freedom of information act’ in December 1766. In that sense, Forsskal’s work was an important intellectual catalyst for the measure. Forsskal himself was dead (aged 32) by the time of its adoption, having contracted a fatal illness in Jerim, Yemen, whilst part of an expedition to ‘Felix Arabia’ commissioned by the King of Denmark.

Conventionally understood, freedom of information laws are means of legally compelling public authorities (e.g., central and local government) to disclose information they hold. Significantly though, the 1766 law contains several sections pertinent to the issue of making the administration of justice more transparent and giving the right to publish legal and judicial information.

On a point of nomenclature, the Swedish law is usually referred to as the ‘Freedom of the Press Act’ (1766). This is somewhat misleading. The full title of the measure is ‘His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press’.<sup>7</sup> But, there was no developed ‘press’ in the sense of a media industry in mid-eighteenth century Sweden. The connotation of ‘press’ (from the Swedish ‘tryckfrihetsförordningen’ in the law’s title) is a reference to the printing press. ‘Tryck’ means something that is printed.

The 1766 Ordinance addresses two main topics. First, it deals with the abolition of prior censorship and the freedom to publish. The latter is far from absolute, a number of matters being made legally immune from criticism or questioning. Second, there is the appearance of the legally revolutionary principle of public access to official information. This is described by the Swedish term ‘offentlighetsprincipen’, which has an even broader connotation.<sup>8</sup>

There are several sections which specifically mention court and legal information in addition to what would be included more conventionally as official documents.

Article 6 states:

This freedom of the press will further include all exchanges of correspondence, *species facti*, documents, protocols, judgments and awards, whether they were produced in the past or will be initiated, maintained, presented, conducted and issued hereafter, before, during and after proceedings before lower courts, appeal and superior courts and government departments, our senior administrators and consistories or other public bodies, and without distinction between the nature of the

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<sup>6</sup> Op.cit., paras 7 and 21

<sup>7</sup> English translation of the 1766 Ordinance by Peter Hogg, former Head, Scandinavian Section, British Library, <[http://www.chydenius.net/pdf/worlds\\_first\\_foia.pdf](http://www.chydenius.net/pdf/worlds_first_foia.pdf)> accessed 7 March 2012

<sup>8</sup> <<http://www.sweden.gov.se/sb/d/2184/nocache/true/a/15521/dictionary/true>> accessed 9 March 2012



cases, whether these are civil, criminal or ecclesiastical or otherwise in some degree concern religious controversies; as well as older and more recent appeals and expositions, declarations and counter-declarations that have been or will be submitted to the Chambers of Our Supreme Court as well as the official correspondence and memorials that have already been or may in future be issued from the Office of the Chancellor of Justice; although no one may be obliged to obtain and print more of all this, either *in extensor* or abridged as a *species facti*, than he himself requests and regards as adequate and which, when requested, shall immediately be issued to anyone who applies for them, on penalty of the provisions in the following paragraph but in criminal cases that have been settled by an amicable reconciliation between private individuals no one may, without the agreement of the parties, make use of this freedom as long as they remain alive; while also, if anything concerning grave and unfamiliar misdeeds and abominations, blasphemies against God and the Head of State, evil and cunning schemes in these and other serious criminal cases, superstitions and other such matters should appear in court proceedings or judgments, they shall be completely excluded.

Article 7 continues:

Whereas a legally correct *votum* does not have to be concealed in cases where a decision is arrived at only by the vote of the judge; and as an impartial judge has no need to fear people when he has a clear conscience, while he will, on the contrary, be pleased if his impartiality becomes apparent and his honour is thereby simultaneously protected from both suspicions and pejorative opinions; We have therefore, in order to prevent the several kinds of hazardous consequences that may follow from imprudent votes, likewise graciously decided that they shall no longer be protected behind an anonymity that is no less injurious than unnecessary; for which reason when anyone, whether he is a party to the case or not, announces his wish to print older or more recent voting records in cases where votes have occurred, they shall, as soon as a judgment or verdict has been given in the matter, immediately be released for a fee, when for each *votum* the full name of each voting member should also be clearly set out, whether it be in the lower courts or the appeal and superior courts, government departments, executory authorities, consistories or other public bodies, and that on pain of the loss of office for whosoever refuses to do so or to any degree obstructs it; in consequence of which the oath of secrecy will in future be amended and corrected in this regard.

Finally, Article 9 prescribes:

In addition to the records of trials and other matters referred to above, everyone who has a case or other proceedings touching his rights before any court or public body whatsoever, as also before Ourselves, the Estates of the Realm, their select committees and standing committees, shall be free to print an account of it or a so-called *species facti*, together with those documents relating to it that he regards as necessary to him; although he should in this matter keep to the truth, should he be concerned to avoid the liabilities prescribed in law.

This short tour of two jurisdictions north and northwest of England highlights the point that the legal roots for the concept of ‘open justice’ are rather varied. The Scottish items are sourced in pre-Union Scottish Parliamentary Acts. The Swedish contribution emerges from a less likely basis: its famous 1766 Ordinance.

Citing historical sources, however, is no guide to the current vitality of the notion in either jurisdiction – or the ways in which it can be expanded and improved upon.

**© Dr David Goldberg**

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# TOWARDS LEGAL TRANSPARENCY

***Hugh Tomlinson QC calls for online availability of case law and lists, as part of a new ‘Court Charter’***

The principle of ‘accessibility’ is a vital part of the rule of law. In Tom Bingham’s seminal work it is the first of the essential principles which he discusses: ‘The law must be accessible and so far as possible intelligible, clear and predictable’.<sup>1</sup> ‘Accessible’ in this context means being ‘public and ascertainable’ – there must be simple and straightforward ways of finding out what the law is. No one doubts that principle of accessibility but what is important are effective measures to put this principle into practice.

For much of our history the law has, in practice, not been accessible to the public at all. In contrast to civil law jurisdictions the law is not to be found in ‘codes’ but in a mixture of statute and judicial decision. Statutes and statutory instruments occupy hundreds of large volumes, available only in specialist libraries. The volume of statutory material is immense. A recent House of Lords Library Note<sup>2</sup> shows that, since the war, there has been an average of more than 50 new Acts of Parliament a year and over 2,000 statutory instruments. In 2009 there were 3,088 pages of new statutes and 10,662 pages of statutory instruments.

Access is, on any view, not straightforward. The position in relation to case law was even worse. In 1362 it was decreed that pleadings and judgments of the Courts of Westminster should be in English – but for many members of the public their language remains foreign and the judgments difficult to access.

For hundreds of years knowledge of what happened in court was dependent on private enterprise law reporters – of varying quality. There were many different series of reports, sometimes inaccurate, sometimes not published until years after the judgments were handed down. There were over a hundred series of ‘nominate’ reports – often by moonlighting barristers.

The first ‘official’ Law Reports were not published until 1866. For over a hundred years they remained expensive and accessible only to those with specialist knowledge and access to law libraries. And the Law Reports only contained the cases which the reporters decided the public should know about. Some judgments were left unpublished. If a law reporter was not present in court then the judgment might

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<sup>1</sup> T Bingham, *The Rule of Law* (Faber, 2010), p.37

<sup>2</sup> House of Lords Library Note, LLN 2011/028, 16 September 2011

never become public. Court of Appeal judgments were not transcribed until the 1950s. Even then the transcripts were only available in a small number of libraries. This remained the position when I began to practice the law 30 years ago. These restrictions on access to ‘sources of law’ are one aspect of the restrictive practices of the legal profession.

Has the internet changed the position? How far have we moved towards transparency? Much of the case law of the higher courts is, of course, now generally available online – usually from open free websites such as BAILII<sup>3</sup> in this country and equivalent sites such as AusLII<sup>4</sup> and CanLII<sup>5</sup>. Decisions of the highest courts in this jurisdiction and many others around the world which influence our law are made publicly available, often on the same day they are given. Accessibility in this area has improved beyond recognition over the past decade and a half.

There are arguments about issues such as open justice and restrictions on publicity but the overwhelming trend over recent times has been positive. This has, in part, compensated for the coincidentally concurrent dramatic decline in court reporting. Most courts no longer have a reporter present but some civil courts, at least, provide their judgments to the public shortly after hand down. This does not, however, deal with the fact that the evidence given, particularly in civil cases, is rarely reported on. Although Crown Court and High Court hearings have been recorded for many years, transcripts are expensive.

Hearings at the Supreme Court are now available on a live television feed. In this respect the United Kingdom is ahead of the United States (although the US Supreme Court provides next day audio and transcripts of its short hearing). Similarly, statutory materials are now freely available on the internet via Legislation.gov.uk.<sup>6</sup> This includes revisions to legislation, although not entirely up to date. About half of legislation is now up to date and there are plans to bring all legislation fully to up to date. This is very substantial progress. But there remains a lot to do. I will mention two particular areas of concern.

First, the availability of case law remains incomplete. The free public services cover only a small percentage of judgments and rulings given. The transcription copies are not freely available and producers have copyright in the transcripts of judgments. First instance decisions of the civil courts are sometime only available on the payment of a fee. First instance criminal decisions are rarely freely available at all.

Second, and more importantly, over the past three decades English civil and criminal procedure has moved away from the traditions of ‘orality’. In civil proceedings witnesses rarely give evidence ‘in chief, their witness statements are

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<sup>3</sup> British and Irish Legal Information Institute, <<http://www.bailii.org/>>

<sup>4</sup> Australian Legal Information Institute, <<http://www.austlii.edu.au/>>

<sup>5</sup> Canadian Legal Information Institute, <<http://www.canlii.org/>>

<sup>6</sup> <<http://www.legislation.gov.uk/>>

taken as read. Much argument is conducted on paper through written submissions of various kinds.

Witness statements and written submissions are usually very difficult to obtain. A witness statement which stands as evidence in chief is open to inspection during the trial, unless the court directs otherwise.<sup>7</sup> In practice, this is often difficult to do. Statements of case, judgments or orders are available from the court file without permission. Access to written submissions is more difficult. Civil Procedure Rule (CPR) 5.4C provides that a non-party can obtain from the records of the court, with the court's permission, a copy of 'any other document' filed by a party. It is clear that a non-party has a right to obtain a skeleton argument from the court<sup>8</sup> but there is no system in place to make such access automatic. An application must be made.

It is remarkable that no courts in the United Kingdom make written submissions publicly available. This is in stark contrast to the position in, for example, the United States, Canada or South Africa where the 'briefs' to the Court are freely available to the public on the internet. This is a significant barrier to accessibility as, even when someone is in court, oral arguments are difficult to follow without sight of the written submissions.

A number of reforms and improvements are required to ensure maximum accessibility of the law. A 'Court Charter' is urgently needed to make these rights clear and accessible to everyone. In the meantime, I would propose two which would greatly assist those who are seeking to follow and understand court cases. These could be implemented quickly at relatively modest cost as they involve the making public of information which the courts already have or which they could require to be provided by the parties.

First, there should be online availability of full case information – all statements of case, judgments, orders, witness statements and written submissions. This could be done immediately in the Supreme Court – as court documents have to be filed electronically. Systems would have to be put place in other courts to provide for electronic filing but there is no reason why this could not be done immediately in cases of public interest and progressively in other types of case.

Second, there should be online availability of full and up to date court lists, with lists of upcoming cases and archives of previous listings. The list could include, as a minimum, the case name, the subject matter of the case or, for criminal cases, the charges and the names of the parties' lawyers.

The progress of the law towards transparency and accessibility has been slow. The developments in electronic information storage over the past two decades have brought huge improvements.

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<sup>7</sup> See CPR 32.13

<sup>8</sup> For example, in *R (Davies, James and Gaines-Cooper) v HMRC* Court of Appeal allowed a non-party's application for access to HMRC's skeleton argument

The 'Justice Wide Open' conference is an important opportunity to ensure that this movement does not lose momentum.

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# THE FREE LEGAL INFO LANDSCAPE

*Emily Allbon asks whether we can expect an inspiring view for the free legal future*

As ‘gatekeepers of information’ librarians are most concerned with ensuring the best quality information makes its way to our users, whoever they might be. Law librarians or legal information professionals work within all sorts of organisations: academic institutions, law firms, barristers’ chambers, government libraries, inns libraries and in-house within companies. The last 10-15 years have seen a massive shift in the nature of legal research and the tools available to us and yet we are still in a situation where many of the primary legal materials in the UK are inaccessible to those who cannot afford the cost of subscription legal databases.

Librarians have always been very pro-active in pushing those resources provided at no cost, alongside the paid-for commercial services that we have no choice but to rely upon. These recommendations often materialise in the form of legal gateways, created by librarians to point their users in the direction of useful websites. The first of these was *SOSIG Law* (Social Sciences Information Gateway), a huge portal to law websites available at no cost on the internet. The resources were all evaluated and described by librarians. This later became the *Intute* service when funding ceased, and now with JISC halting funding in 2011, the Institute of Advanced Legal Studies have taken over the data to integrate into their *Eagle-I* service.

Others of note in the UK include *Lawbore*, the portal for law students from City University, created to ensure students would know where to find legal information online (even if they went on to work in places where legal databases would be unavailable), and the many examples of collaborations in other jurisdictions like *EISIL* from the United States. Within universities the push to invest in repositories has often been driven by the librarians, wanting to provide a service free to all, sharing the institution’s intellectual capital with the world whilst loosening the chains of reliance on prohibitive journal subscriptions.

Essentially librarians play a role in promoting resources and advocating on behalf of our users, representing them against often-aggressive commercial publishers. Can we really make a difference?

In the US the AALL (American Association of Law Libraries) have had enormous influence on the way federal and state documents are made available online with their un-snappily entitled ‘*Principles and Core Values Concerning Public*



*Information on Government Websites*.<sup>1</sup> This document and accompanying pressure from AALL lays down minimum requirements for the publication of legal materials on the basis of accessibility, reliability, comprehensiveness and preservation. Importantly they draw out what is termed ‘official’, an important point we will visit later in this paper. This commitment to ensuring that the electronic document is as trustworthy as the print material has resulted in its adoption by the Uniform Law Commissioners in the US in the recently enacted Uniform Electronic Legal Materials Act.<sup>2</sup>

### **The current situation**

In the UK paid-for services still dominate: the long-running duopoly of Lexis and Westlaw overshadowing all others. In the last one to two years the situation has altered a little in that smaller publishers have been withdrawing their content to run their own specialised services on their own platforms (Informa, Jordans). The ICLR (Incorporated Council of Law Reporting) have also created their own service ICLR Online, but at present the content remains on other platforms too.

Whilst it is preferable to see the range of products increasing, it does leave information services and libraries in a difficult spot; we often still need to subscribe to the big two, but then need to pay extra for these niche products to retain our coverage. Many libraries have a policy of e-first, which means that they have cut the physical hard copy (to increase access, save space) and as most services don’t allow you to archive content, as soon as you cancel an electronic subscription access to all content disappears, no matter how many years you may have been subscribing.

In addition many database providers focus their services around the requirements of their biggest customers, the global law firms, meaning that often the academic customers lose out in terms of functionality that works for them.

### **So what can you find for free online?**

There is a great deal of law available at no cost online, certainly compared to a decade ago. It is however, not always easy to find and sites are not ‘joined up’ to create any kind of cohesive picture. The one stop shop does not exist.

In many countries now there is a culture of publishing judgments online, usually in full text. This may be via the specific court or might be held on a website run by a legal information institute (more on these later). Usually these are published on a case-by-case basis without the value-added features you would expect from a subscription service such as linking to similar cases or related legislation. Many

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<sup>1</sup> AALL, ‘Principles and Core Values Concerning Public Information on Government Websites’ (AALL, 2007) <<http://www.aallnet.org/main-menu/Advocacy/recommendedguidelines/principles-core-values.html>> accessed 11 March 2012

<sup>2</sup> Amy Taylor, ‘Authentication and Digital Law: Report from AALL’ (Government Information Division, SLA) <<http://govinfo.sla.org/2011/07/28/authentication-digital-law-report-from-aall/>> accessed 08 March 2012

courts publish their decisions online almost instantaneously and there are some great examples of those who extend this with commentary too: the UK Supreme Court blog being a prime example.

Similarly many governments publish their legislation online, however the big stumbling block here is how the amendments are incorporated.

Access to treaties and other instruments of ratification with legal impact is also scattered widely across the web. The disparate nature of these resources means that it can be quite a struggle to find what you need.

Journals are very tied down. There are a few sources of free online legal journals like DOAJ (Directory of Open Access Journals) but in the UK these make for shamefully slim pickings. Academic writers gain their prestige via published work and the journal publishers make the most of this.

To gain an insight into what's available you simply need to look at some of the gateways mentioned at the beginning of this paper, however for primary legal materials the big two are as follows:

## **BAILII**

As the main resource for free legal material in the UK, BAILII offers access to both case law and legislation. There are omissions, notably the criminal courts but what BAILII has achieved in a country so enslaved by commercial legal publishers is pretty remarkable. BAILII contains 80 databases and covers six jurisdictions, however there is a far greater volume of content post 1997.

BAILII undertook some really useful work for the academic community under its OpenLaw project; asking lecturers and librarians for their recommendations of the key cases in each subject area and digitising 2500 of them. It has also made excellent progress around law reform coverage; making available Law Commission publications, and painstakingly scanning and converting over 6,900 Privy Council judgments.

BAILII as a legal information institute (in this case the British and Irish Legal Information Institute) first launched in 2000, some eight years after the first incarnation of these at Cornell University Law School in 1992, which published US Supreme Court judgments online. After Cornell, came LexUM from the University of Montreal and the giant AustLII (University of Technology, Sydney and University of New South Wales) in 1995.

You might ask what connects these LIIs? What features characterise them? Graham Greenleaf one of the founding members of AustLII describes their characteristics thus:

1. They publish legal information from more than one source (not just 'their own' information), for free access via the internet, and

2. They collaborate with each other through membership of the 'Free Access to Law Movement' (FALM).<sup>3</sup>

Greenleaf goes on to list other features which are shared by the majority of LIIs, including collaboration through data sharing networks, independence of government and the use of open source search engines.

The FALM is a collaborative and decentralised initiative formed in 2002, representing in excess of 900 databases from over 139 countries. Their principles are enshrined within a Declaration on Free Access to Law,<sup>4</sup> and aims centre around the adoption of open standards, sustainability of models and effectiveness of use.

Put simply, the LII concept is to gather all the free legal resources onto one uncluttered searchable platform, using a powerful search engine to index the material and allow users to search across different types of legal material.

### **Legislation.gov.uk**

It has been a rocky road for the provision of free online legislation in the UK. We have had free access to legislation since 1996, then published by Her Majesty's Stationery Office (HMSO) (later known as the Office of Public Sector Information [OPSI]).<sup>5</sup> Coverage was extended some years later to 1988, but until 2006 only the original un-amended statutes were available. Whispers of the development of a database of amended legislation had been circulating since the early 1990s and the Statute Law Database (SLD) finally arose in 2006. OPSI and the SLD were combined and re-launched as Legislation.gov.uk in July 2010. It was heralded by Lord McNally, then Minister of State and Deputy Leader of the House of Lords, who celebrated its launch with the following words:

This is the public's statute book. Legislation.gov.uk presents complex information in a clear and intuitive way. This is groundbreaking work that puts democracy at the heart of legislation and makes a major contribution to the government's transparency agenda.<sup>6</sup>

Ironically it is not until you have experienced navigating a publication like Halsbury's Statutes in hard copy that you come to realise why our law might be so difficult to make provision for online.

There are so many different ways we might require the law for a start: as it was when given royal assent, as amended today and also at a particular point in time.

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<sup>3</sup> Graham Greenleaf, 'Free access to legal information, LIIs, and the Free Access to Law Movement' in Richard A. Danner & Jules Winterton (eds), *The IALL International Handbook of Legal Information* (Ashgate, 2011) p.202

<sup>4</sup> Declaration on free access to law (WorldLII, 2007) <<http://www.worldlii.org/worldlii/declaration/>> accessed 10 March 2012

<sup>5</sup> Janice Sayer, 'Review article on the Statute Law Database' (2008) LIM 299

<sup>6</sup> 'Groundbreaking legislation website launched' (The National Archives, July 2006) <<http://www.nationalarchives.gov.uk/news/478.htm>> accessed 10 March 2012

The current situation is that we can find much of the first for free, less than half of the second and little of the last.

### **What about other countries?**

In March 2010 there were 33 members of the Free Access to Law Movement. Their coverage and origins all differ enormously, despite their shared mission. As we have seen, many LIIs have universities as their driving force and indeed financial backers (AustLII, the original LII at Cornell, HKLII), others are funded by non-profit trusts, foundations or NGOs. This can be seen via BAILII whose Trust comprises courts, universities and the legal profession. The legal profession has funded LIIs like CanLII, Juri Burkina and CyLaw, as a professional and public service. Some of the problems faced by the LIIs include overcoming technology issues, locating investment and finding people to commit. Here's a quick overview of some of the LIIs from Graham Greenleaf:<sup>7</sup>

- **AustLII** (Australasian Legal Information Institute) started 1995, now contains nearly 400 databases of Australian law, including decisions of 120 courts and tribunals
- **CanLII** (Canadian Legal Information Institute) started 1993 as LexUM. LexUM then developed CanLII in 2000. CanLII contains over 150 databases – including historical and up to date versions of legislation from all 14 jurisdictions
- **HKLII** (Hong Kong Legal Information Institute) commenced in 2002 with 13 databases and a bilingual system
- **PacLII** (Pacific Islands Legal Information Institute) provides 180 databases covering the laws of 20 islands/territories

Other LIIs include NZLII (New Zealand), CyLaw (Cyprus), JuriBurkina (Burkina Faso) and SALII (Southern Africa). More recently LIIs have been created to allow federated searching: one platform to search several LIIs at once. There are plans afoot for a EuroLII but currently those existing include:

- **AsianLII** – portal covering 28 Asian countries (3 LIIs)
- **CommonLII** – portal containing data from 56 commonwealth countries (11 LIIs). The inclusion of the full series of the English Reports was an exciting addition
- **WorldLII** – portal containing data from 183 countries (17 LIIs). Allows searching of 1400 databases, including at least two million cases

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<sup>7</sup> Graham Greenleaf, 'Free access to legal information, LIIs, and the Free Access to Law Movement' in Richard A. Danner & Jules Winterton (eds), *The IALL International Handbook of Legal Information* (Ashgate, 2011) p.204

### **Do professionals really use the LIIs?**

As the situation in each country is so different, the success of the LIIs isn't easy to measure. In both Australia and Canada, there does appear to have been a real move towards using the free resources provided by the LIIs in tandem, and sometimes in preference to the paid-for subscriptions. A survey on the use of CanLII as far back as 2008 found that 43% of Canadian lawyers said they could do half their legal research via CanLII, and 71% stated that it had reduced their legal information costs.<sup>8</sup>

In the UK BAILII is without doubt a popular service, with 40,000 unique visitors each week, viewing approximately 800,000 pages each week.<sup>9</sup> A snapshot of the use of free resources for law can be seen in an MSc dissertation completed at City University in 2010.<sup>10</sup> Sarah Jones focused her research around barristers' chambers, surveying chambers librarians and barristers. Sixty-four per cent of those surveyed used BAILII at least a few times a week, with 52 per cent using sites like AustLII and CommonLII a few times a week. Participants also noted high use of sites like Eur-Lex (official portal of the European Union) and HUDOC (human rights materials).

Free legislation sites were not held in much esteem; with too many issues perceived around trusting the currency of such a source. Seventy per cent of those surveyed said they would always use a subscription site for legislation.

BAILII itself has recently conducted a detailed survey but the results are not available at time of going to press. A survey focused on an individual set of chambers in 2011 revealed approximately 500 pages of the BAILII site being accessed weekly.<sup>11</sup>

### **When is material 'official'?**

Countries have been slow to grant their online representation of legal materials with the same 'official' status given to the print version. Claire Germain speaks of the confusion between 'official' and 'authentic', sometimes used interchangeably within this context and on other occasions as separate concepts. She defines authenticity as 'an online authentic legal resource is one for which a government entity has verified the content to be complete and unaltered from the version approved or published by the content originator'.<sup>12</sup> This authenticity would normally be provided by encryption technologies.

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<sup>8</sup> Catherine Best, 'Make CanLII your first stop for legal research' (Law Society of British Columbia, October 2008) <<http://www.lawsociety.bc.ca/page.cfm?cid=480&t=Make-CanLII-your-first-stop-for-legal-research>> accessed 11 March 2012

<sup>9</sup> 'BAILII's appeal for funding' (BAILII, March 2012) <http://www.bailii.org/bailii/appealdetails.html>> accessed 09 March 2012

<sup>10</sup> Sarah Jones, 'Freeing the law: a study of free online legal resources and their use by barristers' (Msc dissertation, City University 2010)

<sup>11</sup> 'BAILII's appeal for funding' (BAILII, March 2012) <<http://www.bailii.org/bailii/appealdetails.html>> accessed 09 March 2012

<sup>12</sup> Claire Germain, Digitising the World's Laws in Richard A. Danner & Jules Winterton (eds), *The IALL International Handbook of Legal Information* (Ashgate, 2011) p.193

In the UK the requirement to use the ‘official’ report within court (the Law Reports published by the Incorporated Council of Law Reporting), as per Lord Woolf’s practice direction<sup>13</sup> means that reports on BAILII are useful for background research but not for court use. This is not unusual: many countries will not recognise the official status of their materials published online. In the European Union, the Eur-Lex website states that ‘only European Union legislation published in paper editions of the Official Journal of the European Union is deemed authentic’.<sup>14</sup> France seems to stand out in this realm by declaring their free digital versions authentic in 2004.<sup>15</sup>

### **The backlash to LIIs**

In September 2011 an editorial in the *Guardian*<sup>16</sup> discussed the online provision of judgments to the public, questioning to what extent a site like BAILII was actually improving access to judgments, particularly in light of it not allowing search engines like Google to index its judgments. BAILII says this is because judgments may sometimes need to be removed or altered at a later date, and not every search engine can guarantee that pages will not be cached, making older versions visible. Sir Henry Brooke, retiring Chairman of the BAILII trustees, defends their position further by stating that they provide ‘a searchable database of judgments on one website... [which is] sufficient to make this source of law freely available to the public’.<sup>17</sup> He goes on to state that making it available to other search engines is unnecessary to achieve this objective.

### **Free as in beer or free as in speech?**

Graham Greenleaf speaking at the Institute of Advanced Legal Studies, London, in January, touched upon what we actually mean by ‘free access’ and how the concept fits in to our assumed values of liberty, democracy and the rule of law. Those aspects which relate to rule of law are interesting on several levels; does making legal information more accessible make justice more accessible?

Some commentators have asked whether UK case law should be made accessible in the same way as UK legislation, but Greenleaf questions this: ‘If the rule

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<sup>13</sup> Practice Direction (Judgments: Form and Citation) [2001] 1 WLR 194

<sup>14</sup> Important legal notice (Eur-Lex) <[http://eur-lex.europa.eu/en/editorial/legal\\_notice.htm](http://eur-lex.europa.eu/en/editorial/legal_notice.htm)> accessed 07 March 2012

<sup>15</sup> Claire Germain, Digitising the World’s Laws in Richard A. Danner & Jules Winterton (eds), *The IALL International Handbook of Legal Information* (Ashgate, 2011) p.194

<sup>16</sup> Editorial, ‘Courts: judgment day’ (Guardian, 25 September 2011) <<http://www.guardian.co.uk/commentisfree/2011/sep/25/criminal-justice-uk-digital-database>> accessed 08 March 2012

<sup>17</sup> Nick Holmes and Sir Henry Brooke, ‘Judgment Day for BAILII’ (Society for Computers and Law, 2011) <<http://www.scl.org/site.aspx?i=ed22972>> accessed 08 March 2012

of law belongs to citizens, not the State, access to law in ways not controlled by the State is clearly desirable, perhaps essential'.<sup>18</sup>

The main driver for wanting to open up the law is that anyone should be able to find the law as it stands at the present time. The principle of 'ignorance of the law is no excuse' can be traced back to Roman times, and yet in 2012 we find ourselves in the position that access to the primary legal materials of the UK to those without a subscription to a commercial legal database is fairly patchy. A member of the public with no legal experience would find it extremely difficult, verging on impossible, to look for both the case law and legislation relating to their particular situation and be sure they had all the information required. We could go further and ask whether it is even enough to simply provide access to the law? How can it be made understandable too?

Legal blogs have made inroads here, and offer those interested in legal developments, whether breaking cases, new legislation or legal reform and provide a place not only to gain this understanding but also to engage through comments. Law becomes accessible via the excellent critique offered by bloggers like the writers of the UK Human Rights Blog, The Small Places, PinkTape, Head of Legal and Nearly Legal. 'Current Awareness' sites like the one provided by the Inner Temple Library also play a big role in flagging up these legal developments, and the microblogging tool Twitter has had a significant impact on how such developments are disseminated. Our access to legal materials online for free is certainly improving, but our view of the landscape is far from panoramic.

### © Emily Allbon

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<sup>18</sup> Graham Greenleaf, 'Free access to legal information: roles in the expansion of liberty, democracy and the rule of law' (IALS lecture, 17 January 2012) Video and slides available <[http://ials.sas.ac.uk/news/Graham\\_Greenleaf\\_at\\_IALS\\_2012.htm](http://ials.sas.ac.uk/news/Graham_Greenleaf_at_IALS_2012.htm)> accessed 11 March 2012

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# ACCESSIBLE LAW

**Nick Holmes** explores what more we need in order to understand the law and introduces his *FreeLegalWeb* project

Professor Richard Leiter, on his blog, *The Life of Books*<sup>1</sup>, poses ‘The 21st Century Law Library Conundrum: Free Law and Paying to Understand It’:

The digital revolution, that once upon a time promised free access to legal materials, will deliver on that promise; it's just that the free materials it will deliver, even if it comprises the sum total of all primary law in the country at every level and jurisdiction, will amount to only a minor portion of the materials that lawyers need in order to practice law, and the public needs in order to understand it.

This article explores what more we need in order to understand the law and how this need can be met.<sup>2</sup>

## Free access to law

Free access to primary law is of course a prerequisite for the interpretation and understanding of the law. In the UK and most countries with a common law tradition, the cause of free access to law is espoused by the Free Access to Law Movement, a collective of legal information institutes that began with the creation of the Cornell Law School Legal Information Institute<sup>3</sup> in 1992. In the UK we are represented by the British and Irish Legal Information Institute (BAILII<sup>4</sup>), set up in 2000 with the enormous help of the pioneering Australasian Legal Information Institute (AustLII<sup>5</sup>).

In October 2002, at the 4th Law via Internet Conference in Montreal, the LIIs published a joint statement of their philosophy of access to law in the following terms:

Legal information institutes of the world, meeting in Montreal, declare that,  
Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;  
Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;

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<sup>1</sup> R Leiter, Life of Books <<http://thelifeofbooks.blogspot.com>>

<sup>2</sup> This article was originally published on VoxPopuLII, the blog of the Cornell LII, February 2011 at <<http://blog.law.cornell.edu/voxpath/2011/02/15/accessible-law/>>

<sup>3</sup> <<http://www.law.cornell.edu>>

<sup>4</sup> <<http://www.bailii.org>>

<sup>5</sup> <<http://www.austlii.edu.au>>

Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.

So, to paraphrase liberally, we have a right to access the laws of our land, free of charge and openly licensed. ‘The problem for aggregators like LII,’ Leiter points out, ‘is that the information that they provide is only as good as the sources available to them. And governments are just not very good sources of their own information.’<sup>6</sup>

In the US, Law.gov is a movement working to raise the quality of government information, proposing a distributed repository of all primary legal materials of the United States. It believes that ‘the primary legal materials of the United States are the raw materials of our democracy. They should be made more broadly available to enable an informed citizenry,’ and that ‘governmental institutions should make these materials available in bulk as distributed, authenticated, well-formatted data.’ In other words, we need more than free access to law; we need free access to good law data.

### **UK legislation**

We were fortunate that the previous administration’s Power of Information agenda was being implemented by the Office of Public Sector Information (OPSI), whose role also includes that of Queen’s Printer (of legislation). In December 2006, the long-awaited Statute Law Database (SLD) was published, having been more than 10 years in development. This provided (subject to a number of shortcomings) point-in-time access to all in-force UK primary legislation since the year dot, and access to all secondary legislation published since 1991. Responsibility for the SLD then lay with the Statutory Publications Office (SPO), part of the Ministry of Justice. In 2008 the decision was taken to merge the SPO into OPSI, who had been publishing all as-enacted legislation since 1988. The merger would bring the online legislative services together, creating a single place where visitors could access the widest range of legislative content held by the government, alongside supporting material. That service is [legislation.gov.uk](http://legislation.gov.uk)<sup>7</sup> launched in July 2010, which has now replaced the SLD and OPSI legislation services.

The [legislation.gov.uk](http://legislation.gov.uk) interface provides simple and direct browse access to legislation by type, year and number, and simple or advanced searches to locate matching legislation. Primary legislation can be viewed as at any point in time since 1991. More important than this improved access to legislation, however, is the fact that the content is open. It is all well-structured XML (Extensible Markup Language); any piece of legislation or legislation fragment can be addressed reliably and simply in various useful formats via the URI (uniform resource identifier) scheme; and any list of legislation can be delivered as an Atom feed. And a new

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<sup>6</sup> R Leiter. Life of Books <<http://thelifeofbooks.blogspot.com>>

<sup>7</sup> <<http://www.legislation.gov.uk>>

licensing model for public sector information was introduced at the same time: the Open Government Licence.<sup>8</sup>

Unfortunately, there are insufficient government resources to maintain an up-to-date, consolidated statute book, as public sector information consultant Shane O'Neill observed:<sup>9</sup>

The lack of up-to-date consolidation – no fault of the Legislation.gov.uk team who have laboured valiantly on their Sisyphean task – must be a concern to those who harboured greater ambitions (not least government and judiciary). It leaves access to an up-to-date and consolidated statute book in the hands of those who have invested in and deliver highly exclusive legal information services.

The legislation.gov.uk service is delivered by The National Archives (of which OPSI is part). John Sheridan describes the development in some detail in an earlier post on the Cornell VoxPopuLII site<sup>10</sup>:

We had two objectives with legislation.gov.uk: to deliver a high quality public service for people who need to consult, cite, and use legislation on the Web; and to expose the UK's Statute Book as data, for people to take, use, and re-use for whatever purpose or application they wish.

There's more about the technical project and the people behind it from Jeni Tennison, technical lead and main developer (at TSO), on her blog.<sup>11</sup>

Sheridan is also on the expert panel of technologists advising the government on making public sector information more open and accessible on the web, an initiative which led to the development of data.gov.uk,<sup>12</sup> which currently provides access to over 5,600 central government datasets.

## **UK case law**

Unfortunately, the public provision of case law in the UK is woefully inadequate, and we have to rely on the efforts of the charitable BAILII to collate and deliver anything approaching a comprehensive collection of recent judgments. BAILII does a grand job in the circumstances, but, through no fault on its part, it is not comprehensive and it is not open. The various courts all publish their judgments in their own fashion, with no consistency of approach; in fact the High Court of England and Wales does not publish its own judgments at all, but passes selected handed-down judgments to BAILII (and others) to publish. To make matters worse, our right to access this case law is far from clear. There is some argument whether judges are public servants or not and hence whether their judgments are public sector

<sup>8</sup> <<http://www.nationalarchives.gov.uk/doc/open-government-licence>>

<sup>9</sup> <<http://www.shaneoneill.co.uk/NewsViews/legislation-gov-uk-the-myth-of-sisyphus>>

<sup>10</sup> <<http://blog.law.cornell.edu/voxpath/2010/08/15/legislationgovuk>>

<sup>11</sup> 'legislation.gov.uk: Credit Where it's Due' <[www.jenitennison.com/blog/node/144](http://www.jenitennison.com/blog/node/144)>

<sup>12</sup> <[www.data.gov.uk](http://www.data.gov.uk)>

information or not. In addition, regarding older judgments, the low level of originality required for copyright protection in the UK means that almost all older cases are copyright of either the transcriber or the reporter (or the publisher who commissioned them).

### **Understanding the law**

Does free access to law or, even better, free access to good law data, make the law accessible? Will it empower the average citizen? Unfortunately not. As Leiter says, it is only a fraction of what lawyers need to practice law and the public needs to understand it. The law is not practically accessible: it is difficult to identify, obtain and understand legal resources, and they are frequently out of date. Whilst it is reasonable to expect legal advisers to invest in the necessary commercial services to inform themselves, these services are becoming increasingly unaffordable for the less affluent law practices and third sector advice bodies. For the non-lawyer, the law is all but impenetrable, and solving many legal problems and resolving disputes is in practice affordable only to the rich or those who are eligible for some kind of state support. Lord Justice Toulson in *R v Chamber*<sup>13</sup> bemoaned the complexity of legislation:

To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it. There are four principal reasons. ... First, the majority of legislation is secondary legislation. ... Secondly, the volume of legislation has increased very greatly over the last 40 years ... Thirdly, on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation. ... Fourthly, there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic.

The give-us-the-data-and-we'll-organise-the-world crowd also display a touching naïvety when it comes to the law. For example, on the launch of Legal Opinions on Google Scholar,<sup>14</sup> Anurag Acharya, 'Distinguished Engineer' at Google, said:

We think this addition to Google Scholar will empower the average citizen by helping everyone learn more about the laws that govern us all. ... we were struck by how readable and accessible these opinions are. Court opinions don't just describe a decision but also present the reasons that support the decision. In doing so, they explain the intricacies of law in the context of real-life situations.

Any initiative that makes the law more accessible is to be welcomed, but to empower the average citizen you have to go the extra mile, by explaining the law. Lawyers and legal researchers have spent years learning the law and acquiring the skills that

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<sup>13</sup> *R v Chambers* [2008] EWCA Crim 2467 Available at:  
<<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2467.html>>

<sup>14</sup> <<http://scholar.google.co.uk>>

enable them to navigate and reliably interpret primary law and precedent. They will find value in free access to law and in Google Scholar and other free services that are built on that, but they and the average citizen need more. That need is met largely by commercial publishers, and while there many smaller independent publishers who provide good value in their niches, as O'Neill observes:

Legal publishing has long been dominated by two huge duopolists (Reed Elsevier's LexisNexis and ThomsonReuters) whose scale alone enables them to provide a consolidation of the mix of primary, secondary, case law which characterises our common law system. This has created what [barrister Francis Davey] in *The Times* on 23 May 2006 characterised as 'a two-tier justice system with only the very rich able to access the full consolidated law while those lawyers doing pro bono work are discriminated against.'

But there is an increasing amount of quality free legal commentary and analysis on the web, and we can dream on.

### **The law wiki dream**

Writing in Times Online in April 2006, the eminent Professor Richard Susskind, legal tech guru and adviser to the great and good, spelt out his vision for a 'Wikipedia of English law'<sup>15</sup>

This online resource could be established and maintained collectively by the legal profession; by practitioners, judges, academics and voluntary workers. If leaders in the English legal world are serious about promoting the jurisdiction as world class, here is a genuine opportunity to pioneer, to excel, to provide a wonderful social service, and to leave a substantial legacy. The initiative would evolve a corpus of English law like no other: a resource readily available to lawyers and lay people; a free web of inter-linked materials; packed with scholarly analysis and commentary, supplemented by useful guidance and procedure; rendered intensely practical by the addition of action points and standard documents; and underpinned by direct access to legislation and case law, made available by the Government, perhaps through BAILII. ... A Wikipedia of English law could be an evolving, interactive, multimedia legal resource of unprecedented scale and utility.

Susskind referred specifically to wikis and 'a Wikipedia,' and that was taken rather literally by those who enthusiastically first took up his challenge. But I don't believe he necessarily intended it literally, and I don't believe that 'a Wikipedia' or indeed the wiki platform is appropriate. Wikipedia has to be seen as a one-off; no wiki project since has come anywhere near its scale or success. We are most unlikely to build an encyclopedia of UK law from scratch; but why would we try when there is already a vast free legal web?

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<sup>15</sup> R Susskind 'Quick, get into wikis – before everyone else'  
<<http://business.timesonline.co.uk/tol/business/law/columnists/article703276.ece>>

### **The free legal web**

In 2008, enthused by the developments in open government and by the amount of quality legal commentary that was percolating up on the web, I proposed to set up a service to exploit this – FreeLegalWeb.<sup>16</sup> In the manifesto I listed the free access law resources then available, and I now list them with appropriate updates, here:

- We have free and open access to legislation
- We have other official documents, forms and guidance from government and a commitment to making these resources more accessible and encouraging user generated services.
- We have another substantial free access primary law database – BAILII.
- We have a number of specialists already maintaining specialist law wikis and enthusiasts contributing law articles to Wikipedia.
- We have a growing number of law bloggers, many of whom provide succinct, expert ongoing commentary and analysis.
- We have many other individuals, firms and publishers who publish case summaries, articles, updaters and guidance for free access on their websites.
- We have public, charitable and private services providing free guidance and fora for the public faced with legal processes.
- And finally, we have Web 2.0 technologies that enable (potentially) all these sources to be interrogated, aggregated, ‘mashed up’ and repurposed.

That sounded like a free legal web to me; all we had to do was join it up and curate it! But how feasible is that?

### **A ‘bunch of goo’?**

Bob Berring, legal research guru and Professor of Law at the University of California, Berkeley, gave his thoughts on the matter on YouTube in October 2009.<sup>17</sup> He believes that government efforts in the provision of free legal information have failed because there are no incentives; and that ‘volunteer efforts’, worthy as they may be, are unlikely to be sustained. He rightly says that legal information is not easily packaged: we need a map and a compass to navigate it; it needs to be organised and value added. I think we all agree with that. But his conclusion appears to be that only Wexis have sufficient incentive and only they can mobilise the necessary army to add sufficient value for it to be useful. For Bob, the free legal information that’s out there is ‘a bunch of goo,’ and the only thing that can sort out the mess is ‘the market system’. That’s clearly not the case:

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<sup>16</sup> <<http://www.freelegalweb.org>>

<sup>17</sup> Available at: <[www.youtube.com/watch?v=sko9oiNk5kI](http://www.youtube.com/watch?v=sko9oiNk5kI)>

- government has an incentive to make legal information more accessible
- the legal profession has an incentive to make legal information more accessible
- various non-profits have an incentive to make legal information more accessible
- citizens have an incentive to make legal information more accessible
- and there are many private enterprises short of Wexis who have an incentive to make legal information more accessible.

... How?

### **Curating the legal web**

For help I'm increasingly turning to Jason Wilson, Vice President at Jones McClure Publishing. He has a nice clean minimalist blog<sup>18</sup> with great pics accompanying each post. More importantly, he's interested in the kind of questions I'm also trying to answer, such as Can we crowdsource reliable analytical legal content?

I have given considerable thought to this problem (and I have a greater interest in solving it than most), and I just don't see how a Demand Media or similar model could ever produce good or reliable analytical material.<sup>19</sup>

But in the next breath he acknowledges that a lot of good stuff has indeed already been generated by the crowds, and asks how we will organise that legal web. Actually the question is buried at the end of a dense post about 'exploded data' (the value of analytical content):

My thought at this point is that the legal web is in an infancy that we can't even fathom yet. There is cloud of associated information that our current computer assisted legal research vendors cannot give to us based on their algorithms, especially when they remain in walled-in gardens that don't account for the vast and valuable information being created by users. The question is whether we will step up to organize this sea of data, or wait until a program can do it for us?

Moving on, in a more accessible post on *Slaw* he asks how we can effectively curate the legal web:

Curating this growing body of analytical content will be difficult. It suggests a person-machine process of locating and separating good content from bad, and categorising, verifying, authenticating, and editorialising that content. It will undoubtedly require the creation of a rich taxonomy to help organize and manage the content for later

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<sup>18</sup> <[www.jasnwilson.com](http://www.jasnwilson.com)> accessed May 2012

<sup>19</sup> J Wilson, <<http://www.jasnwilson.com/2010/07/15/crowdsourcing-analytical-content/>> accessed May 2012



discovery, clean metadata, and a good search engine, and raises issues from data permanency to copyrights to brand dilution. It's a mess. But a worthy one I think.<sup>20</sup>

and in the comments to that post:

I suppose the point to my post is whether we can wrap a wiki-like structure and interface around the legal web, and make it a destination for learning about both general topics and specific issues, rather than just a portal for all results that match search terms.

Yes we can! However clever the machine, these tasks – ‘locating and separating good content from bad, and categorising, verifying, authenticating, and editorialising’ – to a large degree require human intervention. But that intervention need only be light touch once we figure out how most effectively to harness the wisdom of the crowds.

## Conclusion

Free access to law is not a panacea, but there is plenty of scope for delivering more accessible law by leveraging not just free law but the free legal web; for delivering free services that are good enough for the average citizen, and for lower cost commercial services that are good enough for the average lawyer. ‘Big Law’ will continue to need Wexis, but the ‘lower-tier’ can be much better served.

The final word I will leave with Tom Bruce, founder of Cornell LII:<sup>21</sup>

We need to make informed choices between inexpensive automated approaches that work by brute force and the hand-crafted, highly-accurate approaches of legal bibliography that are not always scalable or affordable. We need to recalibrate what we mean by ‘authority’, and begin to think about measures of quality and reliability for legal text that avoid the creation of unnatural monopolies in legal information.

## © Nick Holmes

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<sup>20</sup> J Wilson <<http://www.slaw.ca/2010/08/13/curating-the-legal-web/>>

<sup>21</sup> ‘Text of the CALICON10 plenary talk’ <<http://blog.law.cornell.edu/tbruce/2009/02/28/big-world>>

# CATCHING UP WITH THE TRANSPARENCY REVOLUTION

*A ruling allowing the media to access court documents in extradition proceedings helps to entrench openness, argues **David Banisar***

The Court of Appeal took a bold step forward in advancing court transparency in April 2012. The decision<sup>1</sup> in *Guardian News and Media Ltd v City of Westminster Magistrates Court*<sup>2</sup> established in common law for the first time the right of ordinary people and the media to obtain documents that are used in court cases.

It has been a long time coming. The UK has undergone a transparency revolution over the past 10 years. The Freedom of Information Act 2000 (FOIA) has forced over 100,000 government bodies to make the information that they collect and use in daily actions available on request to the public. Recent government initiatives have made the expenditures of government bodies and local governments available online. Parliamentary bills, reports and proceedings are available online quickly.

The courts were an early proponent of openness: open justice has been a principle since the 17th century. It is essential to ensure that courts are accountable by allowing any person to attend court hearings. But as other government institutions have become more open, courts' practices have not evolved to the same extent. The decision to allow tweeting (in principle) is welcome and the BAILII<sup>3</sup> initiative and others have resulted in many decisions becoming publicly available, but many gaps remain. The 'Justice Wide Open' event at City University revealed that there were many legal and practical limits to open justice. Few local newspapers now cover local courts and even the larger national media only attend a few cases; transcripts remain the commercial property of the court reporters and video and audio recording of cases is forbidden for reasons that are hard to understand; non-media such as community micro-sites have little access to anything; the FOIA only has limited application to the courts.

In this case, the growing practice of judges and the lawyers moving to a more document-focused case system and referring to documents that are only partially read out triggered the need to change the rules. An average court case is a bewildering series of references to documents contained in the large boxes on the judges' and parties' tables. A member of the public or reporter has little chance to

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<sup>1</sup> Rob Evans, 'Judgment over extradition case is victory for open justice' The Guardian (London 3 April 2012) <<http://www.guardian.co.uk/law/2012/apr/03/groundbreaking-judgment-extradition-open-justice>>, accessed April 2012

<sup>2</sup> *R (Guardian News & Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420

<sup>3</sup> At <<http://www.bailii.org>>, accessed April 2012

follow, especially when the documents are non-public and only briefly summarised. This decision will allow for better scrutiny of the arguments and the evidence, which is especially crucial in extradition cases where a foreign government is demanding the handing over of persons based on crimes different than under UK law.

The Court based its decision on the common law rather than the still evolving case law on the right to access from the European Court of Human Rights, which is still being resisted by the courts here. But after reviewing cases from Canada, the US, New Zealand and South Africa, the court found that the rest of the world had moved forward on this and considered it wise to follow suit<sup>4</sup>.

A strange aspect of this case was that the US government was the only party opposing the release of the documents. The documents that the *Guardian* were trying to obtain were so basic you really do have to wonder why there was any opposition to their release, especially since no arguments were made that their release would cause any harm. Had the case been held in the US, they would have been routinely made available to anyone who wanted them. Perhaps it was US fear of having to release evidence in more controversial future cases, such as the potential extradition of Julian Assange to the US.

In the US, the Public Access to Court Electronic Records system allows anyone for a very small fee to be able to access most documents submitted electronically, including the briefs in any federal court case. It has over a million users. Taking this decision forward, the UK should now adopt a similar system of proactive disclosure. In the 21st century, open justice should be online justice.

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<sup>4</sup> Article 19's submission in the case is available here: <<http://www.article19.org/data/files/medialibrary/3011/12-04-03-UK.pdf>>, accessed April 2012

<sup>5</sup> At: <<http://www.guardian.co.uk/commentisfree/libertycentral/2012/apr/03/guardian-court-victory-transparency>>, accessed April 2012

## SECRET JUSTICE

*In this article, an abridged version of a chapter from her book *The Silent State*<sup>1</sup>, investigative journalist and activist **Heather Brooke** examines access to the English courts, arguing that the justice system is becoming a closed world, for which the public pays the bill*

Justice must be seen to be done. That's the famous aphorism stated most succinctly in 1924 by Chief Justice Lord Hewitt<sup>2</sup>. But what happens when you put the rhetoric to the test and try and see some actual justice being done? That is what I set out to do in this chapter. If you've been in a court you'll know what it's like, but I want to delve right into the depths of the court service. I have done my utmost to drag Parliament into the modern democratic age and it seems the next institution in need of such a makeover is the courts.

There are three main things the public need to know about courts:

1. who is using them
2. for what purpose (e.g. the case detail)
3. the result

We need to know these things to ensure justice is being done, to understand the laws under which we live and to make best use of the finite resources that fund the judicial system. If the courts are becoming the preserve of the rich, corrupt or brutal, then we need to know as we are footing the bill. Such an allegation is currently leveled at the High Court, which has become the epicentre of 'libel tourism' whereby wealthy businessmen, medical companies and even suspected terrorists from around the globe use the English courts to suppress stories they don't like.

Overall, our court service cost us £1.48 billion in 2008/9, up from £1.3 billion in 2007/8 (a 13.8 per cent increase). Civil courts make up £408 million of that, family courts £196 million and the remainder goes to the criminal courts. In addition, we pay £2.1 billion in legal aid costs, yet the records from these cases are not available to the public. Total staff costs are £859 million, of which £284 million goes to judges. Senior judges are paid a total of £180 million, of which 491 are judicial officers and 281 full-time-equivalent district judges (paid by the day). Salaries for a further 956 members of the senior judiciary are met from the

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<sup>1</sup> Heather Brooke, *The Silent State* (William Heinemann 2010). An extract from Chapter Six (150-186) is reproduced here with the kind permission of the author and publisher.

<sup>2</sup> The judge stated: 'It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

consolidated fund, i.e. off-budget, so these headline figures don't even cover the full costs.

We pay a lot for our court system, but to be honest, it's not enough. Courts are under-resourced, there aren't as many as there need to be to meet demand, and facilities are in desperate need of modernisation. Open justice should be honoured as a point of principle, but if we're going to invest even more public money in the court system it's vital we understand where this money is going and receive some benefit for our considerable contribution. You might think there would be a drive in the judiciary to enable citizens to access the justice system in the easiest manner possible, for example without having to come to court, but that is not the case. Quite the opposite drive exists. Those few people who attend court either individually or on behalf of the public face a barrage of obscure, illogical and mercurially enforced rules. Trying to obtain court documents is about as easy and affordable as circumnavigating the globe. What this shows is the complete lack of regard within the judicial system for the public's right to see justice being done. It is an afterthought, and very often not even that. There is simply no understanding that the courts exist solely for the interests of the public at large. And if the public can't see justice being done then the entire system is little more than a cloistered club solely for the benefit of judges, lawyers and their lackeys, a sort of care in the community for the upper- middle classes and their servants.

Some courts have dragged themselves into the 21st century and are equipped with modern technology (microphones to amplify the main participants and TV screens for CCTV footage or satellite link-ups), but the representation of the courtroom itself remains thoroughly nineteenth century. Back then, of course, the way people saw justice being done was to go along to their local court and sit through a trial. Before television or the internet, trials were the ultimate reality entertainment, revealing all the riches (and horrors) of humanity. I'm not a fan of so-called reality TV – if I want reality, I get it the old-fashioned way and go along to the public gallery of a local court.

### **Recording the courts**

In the age of real-time, zero-cost distribution, the obvious solution to the demise of the court reporter and the plight of the court sketcher is to use modern technology to allow people to see or at least hear trials as they happen or retrospectively. Yet the use of technology for broadcasting justice is firmly resisted by the courts, making it more difficult than ever to see justice being done – or, indeed, heard. It is in the production of transcripts that the greatest injustice is occurring, and there is no clearer example of how justice in Britain is solely for the rich.

Simply put, the courts' refusal to allow people to tape-record open-court proceedings provides an opportunity for a few private companies to monopolise the transcription market. If you want to know what was said in court you have to pay one of these private companies a lot of money. It normally costs around £150–250 per hour of typing time, and – get this – before the transcription process begins, the courts make you sign a form stating that you will pay whatever amount the company decides! If they say it took them fifteen hours to type up the transcript you're obliged to pay  $15 \times £250 = £3,750$ . If they say fifty hours that's £12,500. And there's no way to know beforehand how many hours they will charge you for.<sup>3</sup>

'You have to trust them and agree to pay them any amount of money they decide,' Bronagh Taylor told me. She used to be a legal secretary but now works as a researcher at the BBC. 'If there are difficult names and they have to rewind the tape that costs you more. You could be out thousands and thousands of pounds by the time they're done. There's no way round it and there's no way of proving it didn't take the amount of time they tell you. You've nothing to stand on once you've signed that form.'

It's understandable that the typists themselves won't know how long it will take them to transcribe the recordings until they actually begin, but why can't the public make their own recordings or at least have access to any official ones, which they have paid for through their taxes? Many trials in the upper courts are now officially recorded (and in the case of the new UK Supreme Court, filmed<sup>4</sup>) yet these records are not made available to the public.<sup>5</sup> All High Court hearings began to be digitally recorded from February 2010, but when I spoke to the court's governance officer he told me there were no plans to let the public access these recordings directly. The reason given is one that should be familiar to you by now: unlike private companies, the public can't be trusted, and might change the record so it would no longer be accurate.

As it is, only the rich can afford to have transcripts made, either from the official sound recording or by paying for a court-approved private stenographer. Thus transcripts are the preserve of the wealthy and they remain locked in lawyers' offices never to benefit the general public who are paying for the rest of the judicial

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<sup>3</sup> Even the judgments in all criminal, civil, admin and Court of Appeal cases are transcribed by a private company, Merrill Legal Solutions, which has a monopoly. Some judgments are now freely available online at < <http://www.bailii.org> > but by no means all.

<sup>4</sup> The Supreme Court comes equipped with four cameras in each room and proceedings are routinely filmed but very little of this footage has been broadcast. The only material seen in the court's first few months was the first hearing, in particular a 38-minute clip on US public service channel C-Span and some film from the opening ceremony on 16 October 2009. We can see how important the televising of Parliament has become to public understanding; why can't that be extended to the courts?

<sup>5</sup> Another example of the ridiculousness of this prohibition was in 1999 when the hearing for General Pinochet's application for extradition was so packed at Bow Street Magistrates' Court that a closed-circuit TV was set up to accommodate the overflow of reporters. Technically this was a contempt of court but the judges decided that if two conditions were met it was legal: the footage could neither be recorded nor shown outside the court precinct. How's that for showing the public justice being done?

system. This, it seems, is the judiciary's idea of open justice – where the vast majority of court proceedings are seen only by a handful of lawyers and court officials while the public pay the bill but see, and hear, nothing.

Section 9 of the Contempt of Court Act 1981 makes it a contempt to use a tape recorder in court without the prior permission of the court. It is also a crime to publish 'a recording of legal proceedings' made in such a way 'by playing it in the hearing of the public or any section of the public'. Current thinking in the judiciary is still in line with the 1974 report by the Phillimore Committee on Contempt of Court which thought that tape recorders 'produce a more dramatic but not necessarily more accurate record of what occurred in court'.

To this 36-year-old argument I counter: what could be more accurate than a verbatim sound recording? Why is it that the police must tape-record interviews with suspects with twin tapes, one of which must be given to the suspect? The reason is because this is considered the most accurate way of recording a proceeding. If this is good enough for the police then why not for the courts?

Court officials say the public might tamper with the tape or mistranslate words in a transcription. Both these problems are just as likely to afflict a private transcriber or indeed a judge. Currently transcripts of cases can be made only with the consent of the presiding judge, who has the right to amend the wording of the judgment (and often does). Some litigants argue they have suffered as a result, with a judge amending what he actually said at the hearing to what he would have liked to have said.

If the concern is with the authenticity of the tape it is very easy to validate a digital file using cryptographic hash functions. And what better way to ensure accuracy of a transcription than to let as many ears as possible hear the oral recording? When there is only one copy of a tape listened to by only one person, accuracy is much lower than if many copies are listened to by many people. So if accuracy is the argument then allow people to record open-court proceedings and post them online. I have a sneaking suspicion, however, that might actually be what puts off the court officials. Could it be they don't want the public seeing what goes on in court?

While most court hearings are at least recorded, tribunals generally are not. When I attended the Information Tribunal hearing for my own case about MPs' expenses in February 2008, I put my tape recorder on the table ready to record every second of this scintillating event for those unable to make it to this open hearing. I was told that I could not record. Everyone seemed to accept this, but to me it seemed like another one of those 'emperor's new clothes' moments. I asked why and was told it just wasn't done. I pressed further and an official said it would be a contempt of court. I let it go at that and took copious notes. But later I regretted that I'd not

pushed for a better answer because this hearing became the basis for many articles I wrote and indeed a pivotal scene in the BBC4 dramatisation.<sup>6</sup>

Can we have some rationality here: why else do we pay for such public hearings if not so the public can be informed in the most accurate and comprehensive way about them? Instead, the only public record of this public hearing comes from my and another reporter's notes. How can this be more accurate than a verbatim recording? Clearly it's not and yet this is the reality of the current law. I'm confident in my note-taking but I wasn't making a verbatim account and I was rather preoccupied with being a participant in the case.

What is the solution? I can tell you what it is not – privatising this very public service, which would serve only to screw the taxpayer further out of information they have already paid to create. Any solution has to be an open source with public formats; if digital recordings are made they should use a common format such as MP3 or similar so that even if a private company is involved there is no difficulty in passing the material back into the public domain. But ultimately I see no good reason why the people should not be allowed to record open-court proceedings themselves and at the very least access official recordings directly.

### **It's who you know**

Let's take a trip down Fleet Street to the Gothic and ornamental Royal Courts of Justice also known as the High Court. On any day of the week there are important public issues being fought here – not just over private contracts but about medical negligence, judicial reviews of government policy, life-shattering decisions made in the family courts that have societal implications, and issues about press freedom and privacy. The Royal Court is a national court and as such an arm of government.

It's easy to get inside the building for starters and the public are right in the courtroom, bums warmed on wooden benches laid out like church pews in front of the judge's altar. You get a very intimate experience of justice in the High Court and I can't recommend it enough. The cases may not seem as dramatic, but privacy and libel cases are often noteworthy (and, frankly, entertaining – I once managed to catch the proprietor of Express newspapers Richard Desmond being quizzed by a QC on his knowledge of dildos<sup>7</sup>). On the score of seeing justice being done in person the Royal Courts gets a definite thumbs up, but again no recording is allowed.

To find out more I asked James Brewster, the editor of Strand News, an agency of seven reporters covering the Royal Courts. His office is across the street from the court up a tiny spiral staircase that winds past a beauty parlour and a jeweller's. It's another hovel with newspaper clippings on the wall, chipped mugs on

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<sup>6</sup> As a reminder of how rich you have to be to afford transcripts – the BBC budget couldn't stretch to forking out for the transcript of my one-day High Court hearing so instead those scenes had to rely on my notes.

<sup>7</sup> This was Richard Desmond's libel litigation against the biographer Tom Bower which Desmond lost on 23 July 2009.



chipped lino desks. It's proper old school and I love it. I feel like I'm on the set of *The Front Page*. James is full of energy and I catch him in between covering a case and writing it up. I ask him how well he feels he can tell the public about what is going on in the Royal Courts. He tells me there are two main problems: reporting restrictions and access to documents.

Reporting restrictions are orders made by a judge to prevent a reporter making public what he hears in court. James says his reporters live in fear of making a mistake because there is nothing mandating the order be served on them or even written down.

'You need to be very, very alert. The barrister will just stand up and say "Please can I have this reporting restriction?" and then the judge will say "yes" and if you're not there you won't know about it. We're not served with the order. Occasionally it's put on the door . . . Once we named somebody we shouldn't have. The reporter popped to the loo. A reporting restriction was made. Nobody told us about it. Nothing was served on us and yet technically we could've been done for contempt of court. Fined, sent to prison.'

The bad news is these reporting restrictions are increasing. Ironically, it is the younger judges who are keener on closing courtrooms. Another problem is that many judges make reporting restrictions incorrectly because they rely on what they are told by counsel rather than checking the law themselves.

'In the Court of Appeal there is all due process, full consideration before imposing a reporting restriction, but in the High Court the judges have grown up with the Human Rights Act. Article 8 [privacy] has led to a change in the atmosphere of court to the point where the basic principle that there should be public access that is only prevented for exceptional reasons is now such that those reasons need not be exceptional.'

A new fetishisation of privacy has taken hold and cases, particularly involving medical negligence or children, which used to be reported as a matter of course are now closed. We can see what sort of negative societal effect such closed justice has by looking at the myriad problems that have erupted as a result of closure of the family courts. Some social services departments and experts are consistently seeing abuse, especially 'emotional harm', where there is none, and in other instances local authorities have flagrantly ignored the legal requirement that there should be minimum intervention in family life. Yet none of these issues can be addressed unless the courts are opened up. Social workers, judges and expert witnesses – all of whom are often vital to proceedings – can't be held accountable.<sup>8</sup> In addition, the

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<sup>8</sup> Camilla Cavendish has written extensively about the problems of secret family courts in her columns for *The Times*, and argues that it 'should be perfectly possible to keep children's and parents' names out of the press while reporting the evidence in full [since] the media does this routinely in rape cases. But in the family division, reporting restrictions are enshrined in ten statutes, some of which can only be changed by Parliament.'

High Court regularly issues injunctions prohibiting publication of various things but there is no central record of such orders so a request for a copy of any particular order will be met by blank stares unless you know the case number and, more likely, the name of the issuing judge and the date the order was issued. Many of these orders are open-ended, so you could easily be found in contempt for having breached an order which was made years earlier but which you had no way of knowing even existed.

These are some of the problems with proceedings. What about documents?

‘In court there’s a big gap between what we’re theoretically allowed to see and what we actually get to see,’ James says. ‘We’re allowed to see claim forms and particulars [in the hearing]. We get them from the court clerk in the courtroom but nine times out of ten those documents haven’t actually made it to the court file so we don’t get access to them. For some reason they get stuck in the office bureaucracy so when we ask can we see the papers they say: “No, terribly sorry, we haven’t got them.”’

Inevitably, it comes down to that great British tradition of knowing the right people and keeping them sweet.

The evidence from the bundles mentioned in open court is a public record, but again there is nothing requiring a copy to be made available to the public. The clerks don’t often have copies and so anyone wanting to see these records is entirely dependent on the whim of the parties’ lawyers. If they refuse access then you have to make an application to the judge.

‘It’s wrong that independent reporters should be beholden to the parties and their lawyers in this way to access public documents,’ James says. ‘It gives them the opportunity, which they sometimes use, to exclude the press without any judicial intervention. And it makes us feel like a PR agency because we’re put into a position where we could be used by the parties’ lawyers to get their message across.’

Bronagh Taylor agrees. ‘If you know people then it’s easier.’ She says even lawyers can find it difficult to get documents from court. ‘It can often depend on the law firm – if you’re a prestigious one then you get things a lot easier. I’ve had other solicitors call me and say: “Can you try and get this because I’ve tried and I can’t get it?” It is definitely who you know and who you work for.’

Technically, ‘originating process’ documents – that is, all writs and claim forms – are public, but the reality is that they provide very little meaningful information. You’re given a writ book simply showing all the claim forms that have been issued but no factual detail, just *Bloggs v Bloggs*. If you want to search for a specific case then you have to pay a search fee. The sorts of investigations we did in America using court records to discern patterns of malpractice, abuse or litigious bullying by companies or institutions simply cannot be done in England and people are left to be defrauded, abused and put in danger as a result.

As James Brewster sums it up: 'You can't have a democratic society without covering one of the arms of government.' But he knows all too well that as newspapers are cutting budgets so his own budget is cut to the wire and court reporting is not what it was or should be. The difficulty accessing documents only makes it more expensive and time consuming.

Can it be this bad? I decide to try and get my hands on some court documentation. I used to do this in America when I was covering for the court reporter. I would trundle along to the clerk's office, say 'hi' and introduce myself as the covering court reporter, and then spend the next thirty to sixty minutes going through all the court filings. If I wanted more details from a case I'd ask the clerk, who would pull the file, and I'd make photocopies. This all took a minimum of fuss and effort and was at no cost and very little inconvenience to the staff. I simply did my own thing and they let me. That was a county court but it's the same in pretty much any American court. At the US Supreme Court you can find all this online, same with Australia, Canada, New Zealand and South Africa. Now let's see the English equivalent.

I head to the East Block of the High Court to a section bizarrely called 'the bear garden' where cases are filed. I'm going to use Jane Clift's case against Slough Borough Council as my test case. I have the names of the parties (which is more than most people will have) but when I talk to the clerk in the customer information office he says I need the case number. Without it, no deal.

'How do I get that?' I ask naively. 'Is there a database somewhere I can look it up?'

To get the case number I have to go to the search room along the hall. Here I have a friendly chat with a man who says that in order to search I must pay a fee of £5 per fifteen minutes of searching. But I have to pay the fee before I search. 'How will I know how long it will take to find something before I start searching?' He says he'll be lenient with me. 'I'm not going to hassle you every five minutes, but if there's a queue then you'll have to go back and pay more money, though if you have the names then fifteen minutes should be enough.'

I head to the fees office, which is inconveniently placed at the other end of the corridor and round a corner. There is another queue. Here you wait and then pay your fee. Armed with this receipt I head back to the search room where hopefully I'll get my case number. Then armed with this it's back to the customer information room where I fill out a form requesting the documents I want. Then it's another wait, from two to five days. If you want a photocopy then it's another trip over to the fees office. You'll pay £5 for the first ten pages, and 50p per page for subsequent pages. These charges apply to each document individually. If I wanted to see anything from the case files (which I do) then I would need permission for which I would have to complete another form and pay another fee (currently £75 if the application is on notice and £40 if the application is without notice or by consent). I'd have to go

before a ‘master’ to explain why, in the interests of justice, I should be given access. Surely in a democracy the default position should be the opposite: the case open unless someone explains to the ‘master’ why it needs to be sealed. Fortunately I can forgo these last stages because I happen to know the law firm that represented Jane Clift as they represented me against the House of Commons (remember, it’s all about who you know).

That’s four different people in four parts of the East Block just to get one document which exists most likely in electronic form and could have been given to me at no cost whatsoever and without inconveniencing four different people.

The entire justification given by the government for imposing fees is to cover administrative costs, but these costs are entirely artificial. Records can be filed electronically and as such the cost of duplication is zero. The court is making needless work for itself.

James Brewster isn’t asking for a lot to cover the courts effectively. ‘I would like to see the courts living up to what the rules actually say. So that in practice we do get access automatically to the documents we are allowed to see.’ The list of documents automatically and readily available should be:

1. claim form
2. particulars of claim
3. skeleton arguments (where the parties lay out their argument)
4. witness statements once admitted into evidence.<sup>9</sup>

‘If we just had those four we could cover every case. But you’d be amazed how difficult it is to get simply the minimum.’ I could go on:

- Public access to case law is only for the rich through private legal databases; even access to the raw data needed to create a statute law database is continually blocked by officials at the Ministry of Justice despite over £1 million of public money being spent on the project.
- The new Supreme Court, which was meant to be a model of a new age of open justice, charges the public a minimum of £350 a time to access documents
- A number of trials are now held in private using secret evidence not available even to the defendant.<sup>10</sup>

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<sup>9</sup> Other courts such as the Canadian Supreme Court and US Supreme Court provide all this information and more to the public online at no cost.

<sup>10</sup> A report on secret evidence by the legal human rights organisation JUSTICE in June 2009 revealed how in the last twelve years, the British traditions of open justice and the right to a fair hearing have been under- mined by the use of secret evidence in closed hearings.

- A children, schools and families bill makes it a contempt of court to report all but a tiny fraction of family court proceedings no matter the public implications.

All manner of good reasons may be put forward for such secrecy, but once the right of the people to see justice being done is eroded, it is not long before there is no justice at all.

We have a justice system paid for by the common people but whose proceedings are available only to the few: the legal profession and the rich, powerful or privileged.

Where reporters were once a substitute for the people's inability to go to the courts in person, now the media are under threat and what little resources remain are spent battling to gain access to information that should be automatically in the public domain. I came across the state's silence even while writing this chapter. In August 2009 I put in my first interview request to the director of the Royal Courts of Justice. I was told he could not talk to me and I was referred instead to the Ministry of Justice press office. After repeated promises to get back to me with answers or even an interview, four months passed and I received no information at all from the ministry.

The courts are in danger of becoming an elitist enclave entirely separate and out of touch with modern society. The privatisation of court transcripts and the numerous restrictions on the public seeing justice done – from the prohibition on sketching and recording to the poorly resourced public galleries – all betray an attitude that the information from open courts doesn't belong to the public but to lawyers and court officials. The justice system is becoming a closed world, a cloistered sanctum of the legal profession, for which we pay the bill.

We pay a lot of money for our judicial system<sup>11</sup> though not enough. An open system with a jury costs more than a secret system with only a judge. In the past this cost was considered one worth bearing for the long-term health of our democracy. Increasingly, though, politicians have not thought it worthwhile to bear these costs.

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<sup>11</sup> The initial set-up costs of the new Supreme Court for which the public have paid but cannot see in action was £56.9 million.

Fewer trials have juries and fewer members of the public are able to see justice being done. Less is spent on the courts and money that could be used to improve the judicial system is instead diverted to reactionary policing methods and universal surveillance for which there is no evidence of effectiveness.

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# OPEN AND SHUT JUSTICE

**Mike Dodd** examines the obstacles faced by journalists seeking to report the courts

The principles of open justice are well established and widely discussed, and the role of the press and journalists in reporting and commenting on the justice system has been the subject of judicial comment and approval. In *R v Felixstowe Justices Ex P Leigh*<sup>1</sup>, Lord Justice Watkins cited with approval Lord Denning's comments in *The Road to Justice* (1955), saying:

[The press court reporter] is, I verily believe, the watchdog of justice. If he is to do his job properly and effectively we must hold fast to the principle that every case must be heard and determined in open court. It must not take place behind closed doors. Every member of the public must be entitled to report in the public press all that he has seen and heard. The reason for this rule is the very salutary influence which publicity has for those who work in the light of it...

and adding:

...Those observations suffice to emphasise to the mind of anyone the vital importance of the work of the journalist in reporting court proceedings and, within the bounds of impartiality and fairness, commenting upon the decisions of judges and justices and their behaviour in and conduct of the proceedings.

But the practicalities of ensuring that justice is not merely done, but is seen to be done, continue to cause problems for those journalists who seek to report on the courts.

Reporters regularly spend time in magistrates' courts, Crown Courts, the High Court, and sometimes the Court of Appeal, observing and reporting on trials and hearings covering issues ranging from terrorism, murder and rape to shop-lifting, or allegations of medical negligence, and disputes over shoddy building work, land boundaries, or the terms of contracts. It is a simple job, one might think – information is given in open court, and should be reportable, and the basic details, such as names and addresses of defendants, the names of witnesses and so on should be obtainable from the court staff if they are not clearly given in open court. The journalist only has to listen, take a decent note, and write the story.

But the journalist must also know that there are more than 60 separate statutes which cover the activities of the press. A fair number of these feature automatic or discretionary restrictions on what may be reported from a hearing or a trial. None of these restrictions, naturally, limits what the member of the public

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<sup>1</sup> [1987] QB 582 at 591



sitting next to the journalist may say to his chums as he discusses the events of the day in the pub that night – or, perhaps, the musings of the blogger who goes home and writes it all up on his website, in happy ignorance of the law.

Many hearings in criminal courts, particularly those held in the early stages of a case, are covered by automatic restrictions which ban publication of all but the most basic details, so as to avoid prejudicing potential jurors when the case comes to trial<sup>2</sup>.

Criminal courts also may impose restrictions on reporting. They may order that reports of all or part of a hearing, or trial, should be postponed<sup>3</sup>, again because they believe that media coverage might prejudice the views of potential jurors at a subsequent trial, or decide that some information, such as the identity of a blackmail victim, must be kept from the public and cannot be reported at all<sup>4</sup>.

Orders may give anonymity to juveniles appearing in adult courts<sup>5</sup>, while juveniles appearing in youth courts automatically get anonymity<sup>6</sup>. Courts may give anonymity to witnesses if they believe that doing so will improve their evidence or co-operation with one party or the other<sup>7</sup>. Victims of sexual offences are automatically entitled to lifelong anonymity<sup>8</sup> – and in the near future, no doubt, provisions in the Education Act 2011 which give lifelong anonymity to teachers accused of offences against pupils in their care will come into force.<sup>9</sup>

So far, one might say, so good; most of these restrictions can be justified, at least to some extent.

The difficulty, however, is not with the law, but with the way in which it is applied, or, in the terminology of the digital age, with the human interface. As often happens with IT systems, it is the operator – in the case of the justice system, the judges, magistrates, lawyers, clerks and other officials involved in it – which is the root cause of the problem.

Magistrates and judges in criminal courts sometimes act as if their powers to restrict reporting are unlimited, and impose orders which are beyond their powers. Orders are made at the request of counsel who often appear not to have checked before making a request to see if the court has the power to make the order sought. Although the principles on which reporting restriction orders may be made are well established, courts continually make orders beyond their powers. For example, it is common for courts to purport to make orders banning the identification of adults by

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<sup>2</sup> See, e.g., section 8 Magistrates' Courts Act 1980, covering remand and committal hearings

<sup>3</sup> Section 4 (2), Contempt of Court Act 1981

<sup>4</sup> Section 11, Contempt of Court Act 1981

<sup>5</sup> Section 39, Children and Young Persons Act 1933

<sup>6</sup> Section 49, Children and Young Persons Act 1933

<sup>7</sup> Section 46, Youth Justice and Criminal Evidence Act 1999

<sup>8</sup> Section 4, Sexual Offences (Amendment) Act 1976, Section 1 Sexual Offences (Amendment) Act 1992. The list of offences in relation to which anonymity for a victim applies was greatly extended by the Sexual Offences Act 2003

<sup>9</sup> Section 13, Education Act 2011, inserting section 141F into Part 8 of the Education Act 2002

using section 39 of the Children and Young Persons Act, which can only be used in relation to those under the age of 18<sup>10</sup>. This damages the principle of open justice – and that damage too often remains, because the media find it too expensive to mount a proper challenge.

Judges have been known to exercise non-existent powers to give anonymity to those accused of sexual offences on the grounds that identifying the defendant will ‘automatically’ identify the victim. This is a nonsense. To say that a hypothetical offender called Artemus Jones raped a woman will not give away his victim’s name or identity. Neither will saying that the rape occurred in a certain town, or giving other details. In reality the judge is usurping the editor’s position; the legislation makes it clear that the onus is on the media to ensure anonymity for sex offence victims, and neither the 1976 or 1992 Act contains any provision empowering a court to order anonymity for an adult defendant.

The Judicial Studies Board – now the Judicial College – has published guidance on reporting restrictions, entitled *Reporting Restrictions in the Criminal Courts*<sup>11</sup>. The latest edition, published in 2009, superseded separate guides on restrictions for the magistrates’ and Crown Courts. The guide sets out in detail the reporting restrictions which can be imposed, and the requirements which must be met. Yet it seems that few courts or judges have encountered this document, or have referred to it when facing a request for a reporting restriction order.

When the law is applied properly, or if no restrictions are in force or imposed, journalists still find themselves facing other difficulties.

Courts should have specific seating for reporters – but this is often unusable, having been colonised by court officials, probation officers, police and others. Many courts have no press seating.

The Court Standards and Design Guide published on a CD Rom in September 2004 by the Department for Constitutional Affairs – now the Ministry of Justice – seems to accept that the press should have reserved seating in courts. In states, on Page 6.3, in section on Section 6, Design Data Sheets & Court Room Design, under the heading ‘3 Elements of court room design: ‘Whether a courtroom is used for a Magistrates’ (section 7), Crown (section 8) or County Court (section 9) there are elements within the design that are functionally similar or identical. These generic aspects are covered here. They include: judges’/magistrates’ bench, clerk’s desk, witness box, jury desk, press desk, exhibits table, advocates’ bench, secure dock, and natural ventilation of courtrooms.

But security staff in courts have been known to refuse to allow journalists into the body of the court, insisting that they cover cases from the public gallery, where, in many cases the acoustics are bad, the seating unsuitable, the view restricted or

<sup>10</sup> Section 39 (1); see also the Court of Appeal decision in *R v Southwark Crown Court, ex parte Godwin* ([1991] 3 WLR 686; [1991] 3 All ER 818);

<sup>11</sup> Available online at: <[http://www.judiciary.gov.uk/NR/rdonlyres/5AC4E743-55FE-4E31-9FAB-7BBEC3DF1B89/0/crown\\_court\\_reporting\\_restrictions\\_021009.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/5AC4E743-55FE-4E31-9FAB-7BBEC3DF1B89/0/crown_court_reporting_restrictions_021009.pdf)>

minimal, and they are exposed to the risk of threats by those who may not want a case covered or certain details reported. On Thursday 8 March 2012 reporters who arrived at Westminster Magistrates' Court in central London to cover the first appearance of Royal Navy submariner Petty Officer Edward Devenney on a charge under the Official Secrets Act were told by court staff that they would have to sit in the public gallery, where the journalists say it is extremely difficult to hear what it being said.

The dispute ended when District Judge Daphne Wickham agreed that reporters could sit in the body of the court. A spokesman for HM Courts Service said it was aware of the problem and was 'addressing the issue'. Making journalists sit in the public gallery is also contrary to the HMCTS guidance on dealing with the media<sup>12</sup> / <sup>13</sup>.

In addition, while the criminal courts regularly make orders restricting reporting, these are not kept on a central register. Governments have wasted millions on pounds of expensive and ambitious IT schemes, but nothing has been done to develop a central database through which current reporting restriction orders, and the information they seek to protect, can be double-checked. Any in-house lawyer, news editor or sub-editor who wishes to make sure that a case is not covered by a discretionary reporting restriction, or who wants to check the details of an order, had better do so before 4.30pm or 5pm, when most courts close for the day, because courts also do not have out-of-hours numbers to contact.

This may be the digital age – but when it comes to information technology and ensuring the widest possible publication of what should be public information, the courts remain in the dark ages, while the public often remain in the dark.

Even if one can get through to a court, a fair proportion of staff are unwilling to give journalists details of orders, some have been known to insist that requests must be made in writing, or that they can only photocopy and post the information sought.

The Ministry of Justice was involved during the closing months of the last Labour government in discussions with media organisations about establishing an online database of reporting restriction orders, but the idea has since sunk without trace, a victim of the supposed cost.

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<sup>12</sup> Media guidance for HMCS staff, October 2010, Page 9: 'It is normal to provide the media with seats in the well of the court during a trial. The media are entitled by law to hear and be present at all open court proceedings. They should not be forced to cover the trial from the public gallery – individual reporters may be at risk of intimidation from friends or relatives to parties in the case...'

<sup>13</sup> In January 2009, staff at Woolwich Crown Court refused a Press Association reporter seeking to report on the case of *R v Abdullah Baybashi* access to the body of the court, telling her to cover the case from the public gallery – a sealed glass-fronted gallery high above the court, which can be reached only by way of a staircase and two corridors, making it impossible for journalists to approach counsel in the trial if they had queries or wished to clarify a point made during a hearing, and impossible to check details with the clerk.

An extra difficulty, particularly with criminal courts, is that despite the requirements of the Consolidated Practice Direction<sup>14</sup> that reporting restriction orders must be written down when they are made, on occasion this simply is not done, with the result that an order might not be recorded properly for days, or might never be put down on paper.

In the civil courts, Part 39 (2) of the Civil Procedure Rules states that ‘The general rule is that a hearing shall be in public’, but judges have been known to refuse to allow journalists in when they do turn up in the apparent belief that they have no right to attend a hearing, as have court security staff<sup>15</sup>.

There are also problems getting information from civil courts. The High Court – including the Family Division – keeps no central register of orders and injunctions. Thus, there is no way to check with the court whether there is an active injunction in force, whether it be a privacy order or one intended to protect children involved in civil proceedings. Inquiries invariably draw the response that one has to know the case number before an order can be tracked, if it can be tracked.

Is this, one wonders, acceptable in this digital, information technology age?

In addition, many claimants who obtain interim injunctions leave them in place and take their cases no further, having in effect obtained a permanent ban which binds anyone and everyone aware of its existence. There are signs that this situation is now changing, following the report on injunctions and super-injunctions produced by a committee set up by the Master of the Rolls, Lord Neuberger.

An extra difficulty in both criminal and civil courts is the frequent, almost knee-jerk refusal of many counsel to allow journalists to have copies of the skeleton arguments they submit to courts before a hearing, even though there have been a number of cases in which judges have declared that journalists should be given copies of the skeletons. In November 2011, barristers involved in a case in which HM Revenue and Customs was challenging the Football League’s rules on insolvency of football clubs refused to give journalists copies of their skeleton arguments, saying they were confidential documents. But Mr Justice David Richards said written arguments prepared by lawyers and parties in civil litigation were not ‘confidential documents’ and should be supplied to journalists, telling HMRC’s counsel: ‘They are not confidential documents. ‘You can do whatever you like with your skeleton arguments. You can post them on a website. Whatever you want.’ He added, ‘I would suggest that you do supply copies of skeletons to the press.’<sup>16</sup>

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<sup>14</sup> Consolidated Criminal Practice Direction, Part 1.3. The Direction is online at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/ccpd-part-1-pds-of-general-application-oct2011.pdf>

<sup>15</sup> See: ‘Security Guard tries to stop reporter entering courthouse’, Media Lawyer website, February 3, 2011; ‘I was wrong, says judge who ordered reporter out of court’, Media Lawyer website, August 19, 2004 (journalist barred, temporarily, from hearing in Chambers)

<sup>16</sup> Media Lawyer website, November 30, 2011

In 2008 Mr Justice Eady ordered that journalist and legal observer Benjamin Pell should be given copies of skeleton arguments put into court as part of an unsuccessful application to stop Channel 4 broadcasting a programme about former SAS officer Simon Mann, who was at that time being held in Equatorial Guinea on charges of leading a coup attempt intended to overthrow the country's government. But Mr Justice Eady said the parties did have the right to redact confidential material from the documents.

In 2003, the Court of Appeal, Criminal Division, held that barristers should give journalists copies of the skeleton arguments they prepare for court hearings if they were asked to do so. Lord Justice Judge, as he then was, said the court was supplied with skeleton arguments, which it read before the actual hearing, which analysed a vast amount of material. It would have been a waste of time for the skeletons to be read or repeated in court. The court had concluded that 'the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received'.<sup>17</sup>

The media itself is active in working for open justice. Journalists regularly challenge orders made in the criminal courts, because they were wrongly made, or impose a substantial and unjustified restriction on reporting. But judges just as regularly ignore or reject challenges, insisting, in many cases despite clear authority to the contrary, that they have the power to do what they have done. Appeals can be made to the Court of Appeal under section 159 of the Criminal Justice Act 1988 – but these involve considerable costs and time, and more often than not the decision is that the story is simply not worth it.

National, regional and local newspapers are active in the field of open justice, as far as their resources allow. The Times has been campaigning to open up the Family Courts, while The Independent has spent a considerable amount of time and effort in prising open the doors of the Court of Protection, step by step and decision by decision over the past five or six years.

There are justifications for some limits to reporting of cases in both the family courts and the Court of Protection. But as Lord Justice Munby, as he now is, has pointed out: '...it must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of the kind which judges of the family courts are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make'<sup>18</sup>. The family courts can have children removed from their parents, allow them to move abroad with one parent, while the Court of Protection may be asked to decide where a man with

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<sup>17</sup> *R v Howell, Harris and May*, [2003] EWCA Crim 486, at paragraphs 193-197

<sup>18</sup> Access to and reporting of family proceedings, a paper by Mr Justice Munby delivered at Jordan's Family Law Conference on October 11 2005

severe autism should live, and who should control his life, or even decide if a patient should be allowed to die.

These are powers which should not be exercised behind a veil of secrecy. While confidentiality to protect the individual concerned is justified, the courts and those professionals who give evidence in them should be open to media and public scrutiny. Only then can the public have true confidence that justice is being done, because they can see it being done.

Our criminal and civil justice systems do operate on the principle of open justice – but there are still many issues to be tackled, and many problems which cannot be solved without first being acknowledged.

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# A CORRECTIVE TO BAD JOURNALISM

**Adam Wagner** answers the Leveson Inquiry's questions about blogging in journalism and law<sup>1</sup>

The definition of 'blogging' is now extremely wide, so much so that the term 'blog' has become in essence meaningless. A blog can be a 'web log' within the original meaning of the word, that is a 'personal journey' published on the World Wide Web consisting of discrete entries ('posts')<sup>2</sup> but it can also be a news and comment website such as the UK Human Rights Blog<sup>3</sup>, a photo-sharing website, a website promoting a business. In fact, practically any website can call itself a blog.

Mainstream newspapers now produce 'blogs' online and as such the boundary between traditional journalism and blogging has also become unclear. The number of websites calling themselves blogs is phenomenal. There are now over 70m sites registered on WordPress alone, accounting for 800m page views each week. This is a significant proportion of the total number of internet sites worldwide. Moreover, Twitter allows individual users to publish statements and is in effect a smaller-scale (in respect of length of individual posts) version of blogging within its original meaning.

Ethics should play a role in blogging, in the same way that ethics should play a role in society generally. It is in society's interest that people are free to follow their chosen system of ethics, as long as their system of ethics does not unduly impinge on the freedom of others. Maintaining this, sometimes uneasy, balance is the basic task of a democratic state. A rough ethical system is emerging in respect of blogging and tweeting. This is not officially enforced by sanctions, but is unofficially enforced by other users. For example, one important principle of blogging is attributing (usually linking to) sources used in a post.

## Regulating blogs

Barristers are regulated by the Bar Standards Board and blogging and tweeting are certainly caught by the Code of Conduct:<sup>4</sup> a barrister was recently fined £2,500 for

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<sup>1</sup> This article is adapted from Adam Wagner's written evidence to the Leveson Inquiry, available at <<http://adam1cor.files.wordpress.com/2012/02/adam-wagner-leveson-statement-7-2-12-signature-redacted.pdf>> accessed May 2012

<sup>2</sup> 'Blog' Wikipedia <<http://en.wikipedia.org/wiki/Blog>> accessed May 2012

<sup>3</sup> Adam Wagner is founding editor and regular contributor to the UK Human Rights Blog, a legal update service written by members of 1 Crown Office Row

<sup>4</sup> Available at: <[http://www.barstandardsboard.org.uk/media/1353125/word\\_version\\_of\\_full\\_code\\_of\\_conduct\\_annexes\\_jan\\_2012\\_.pdf](http://www.barstandardsboard.org.uk/media/1353125/word_version_of_full_code_of_conduct_annexes_jan_2012_.pdf)> accessed May 2012



anonymously publishing inappropriate tweets during a trial, conduct which was found to be 'likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute'.<sup>5</sup> I argue that the Bar Code of Conduct and the Legal Services Act 2007<sup>6</sup> also place lawyers under a professional obligation to increase public understanding of law through, for example, activities such as blogging.<sup>7</sup> I do not think blogs can or should be regulated by a domestic system of regulation, for the following reasons:

1. It is unworkable. Practically, it would be impossible to regulate all blogging. Hundreds of thousands of blogs are set up each day, let alone posts published, and the term is so elastic that the task would be simply too large and amorphous for any regulator to manage. Even if only popular blogs were targeted, say those over a certain number of hits, what is to stop an individual blogger simply setting up a new blog in order to avoid regulation?
2. The current system already works. Criminal and civil law already provides a reasonable level of regulation. Bloggers, whether their websites are read by one or one million people, are subject to financial penalties for libel or quasi-criminal sanctions if they commit a contempt of court. See, for example, the case of Elizabeth Watson (below), who was sentenced to nine months imprisonment (later suspended) for breaching a court order through information published on her personal website. Additionally, Justice Peart has said in relation to an Irish case involving the 'Rate-your-solicitor.com' website that 'The civil remedies currently available have recently been demonstrated to be an inadequate means of prevention and redress'.<sup>8</sup>
3. Self-regulation already exists. Blogging specifically and social media publishing more generally (notably Twitter) is to a large extent self-regulating. As lawyer and journalist David Allen Green put it in a recent blog post:

Regulation is just not about formal 'black-letter codes' with sanctions and enforcement agencies. Regulation also means simply that things are done better than they otherwise would be: for example, when one 'regulates one's own conduct'. Bloggers and others in social media are willing and able to call out media excesses and bad journalism. The reaction is immediate and can be

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<sup>5</sup> The barrister was also struck off for separate offences.

See <<http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=75521>> accessed May 2012

<sup>6</sup> At: <<http://www.barstandardsboard.org.uk/regulatory-requirements/changes-to-regulation/legal-services-act/>> accessed May 2012

<sup>7</sup> See: Adam Wagner, 'Must lawyers blog and tweet?' (UK Human Rights Blog, 24 May 2011) <<http://ukhumanrightsblog.com/2011/05/24/must-lawyers-blog-and-tweet/>> accessed May 2012

<sup>8</sup> Tim Healy, 'Website accused of defamation is closed by judge', (Independent.ie, 1 February 2012) <<http://www.independent.ie/national-news/courts/website-accused-of-defamation-is-closed-by-judge-3005716.html>> accessed May 2012

brutally frank. They are sometimes wrong, as are formal regulators. But they can take time and allow the media to produce better, more well-informed stories.<sup>9</sup>

Bloggers and others in social media are particularly willing and able to ‘call out’ each other’s conduct. The blogosphere and Twitter provide a vibrant, fast-moving and sometimes rather unforgiving arena for debate. As such, an enormous amount of self-regulation and correction already takes place. This is to a large extent the whole point of *social* media. People enjoy observing a lively debate, and Twitter demonstrates the extent to which they are also enthusiastic to contribute. Moreover, the more prominent a blogger or blog post, the more it is likely to be the subject of comment and criticism. This is an efficient system as almost by definition the more influential a blog post, the more heavily it is peer-reviewed.

4. There is a significant risk of chilling effect. Notwithstanding the extreme practical difficulties with regulating blogs, the risk of doing so would be to limit the currently vibrant arena for freedom of expression that helps to keep journalists and politicians in check.
5. There is already-existing regulation by other means. Some bloggers (such as lawyers and other professionals) are regulated by other means, thus bolstering the existing criminal and civil remedies available to victims of ‘bad blogging’. Potentially the most damaging ‘bad blogging’ is a personal attack posted online. As stated above, there is already an array of civil and criminal remedies by which victims of ‘bad blogging’ can seek redress, and a relatively effective means of self-regulation through social media. Practically speaking, I cannot see how victims of ‘bad blogging’ could be given more effective forms of redress except by tweaking the current rules. A formal system of regulation simply would not work.

### **Correcting the press**

The primary reason for setting up the UKHRB was to act as a corrective to bad journalism about human rights, and in under two years it has become a trusted source of information for journalists, politicians, those in government and members of the public. UKHRB operates alongside a number of other excellent legal blogs, run by lawyers, students and enthusiasts for free, which provide a similar service in respect of other areas of law. I would highlight, for example:<sup>10</sup>

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<sup>9</sup> David Allen Green ‘How to think about social media’ (*New Statesman*, 31 January 2012) <<http://www.newstatesman.com/blogs/david-allen-green/2012/01/social-media-regulation>> accessed May 2012

<sup>10</sup> There are now many similar legal blogs – for a full list and hyperlinks see: <<http://ukhumanrightsblog.com/2011/04/24/roll-up-roll-up/>> accessed May 2012

- Nearly Legal housing law blog
- UK Supreme Court Blog
- Inforrm
- The Small Places
- Head of Legal
- Human Rights in Ireland
- Law Think
- Jack of Kent
- Charon QC
- Pink Tape
- Eutopia Law
- Panopticon Blog
- Halsbury's Law Exchange

Human rights is an example of an area of law that is often misrepresented by the mainstream press.<sup>11</sup> This can be the result of a lack of legal expertise amongst journalists, but also represents some newspapers' editorial positions that are if not anti-human rights, then certainly anti-Human Rights Act. It is no coincidence, in my opinion, that the Human Rights Act 1998 is also widely considered to have bolstered privacy rights and as such threatens the celebrity news-driven business model of most newspapers.

Five examples of bad human rights coverage that have been corrected by UKHRB, include:

### **Myth one**

*'The illegal immigrant who cannot be deported because he had a pet cat'*

This claim, and the ensuing 'Catgate',<sup>12</sup> is the most famous example of the misrepresentation of human rights law in the past year, and perhaps ever. It involved the Home Secretary's claim at the Conservative Party Conference: 'We all know the stories about the Human Rights Act... The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat.'<sup>13</sup>

This myth was initially propagated by the press in 2009, and despite being rejected by the judiciary's press office at the time,<sup>14</sup> the story was repeated a

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<sup>11</sup> See UKHRB posts on poor reporting listed here: <<http://ukhumanrightsblog.com/category/blog-posts/poor-reporting/> – also reproduced in an annex to this statement> accessed May 2012

<sup>12</sup> See posts at <<http://ukhumanrightsblog.com/2011/10/05/the-lessons-and-shaggy-dogs-and-catgate/>> ; <<http://ukhumanrightsblog.com/2011/10/04/cat-had-nothing-to-do-with-failure-to-deport-man/>> ; <<http://ukhumanrightsblog.com/2011/10/06/what-the-first-catgate-appeal-judgment-actually-says/>> accessed May 2012

<sup>13</sup> 'Theresa May speech in full' (Politics.co.uk 4 October 2011) <<http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>> accessed May 2012

<sup>14</sup> 'Mail and Sunday Telegraph: cat-alysts for more anti-immigration feeling' (Tabloid Watch, 19 October 2009) <<http://tabloid-watch.blogspot.com/2009/10/mail-and-sunday-telegraph-cat-alysts.html>> accessed May 2012

few weeks prior to the Party Conference in the *Sunday Telegraph*,<sup>15</sup> which is probably why it was included in the Home Secretary's speech. Moreover, despite the claim subsequently being rubbished by, amongst others, the Justice Secretary who called it a 'complete nonsense example',<sup>16</sup> the *Daily Mail* still reported ('Truth about Tory catfight: Judge DID rule migrant's pet was a reason he shouldn't be deported') that the Home Secretary's claim was accurate (for that reason, I placed the newspaper on the 'legal naughty step',<sup>17</sup> a 'regulatory' innovation by the excellent Nearly Legal housing law blog).

## Myth two

### *'UK loses three out of four European human rights cases'*

On 12 January 2012 the *Daily Mail* ('Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals') and *Daily Telegraph* ('Britain loses three in four cases at human rights court') reported – entirely uncritically – a report written by a Parliamentary Aide and signed by 10 backbench MPs which claimed the UK lost three out of four cases in the European Court of Human Rights. This was a misleading statistic as it ignored the thousands of cases brought against the UK that are struck out at an earlier stage, which amounts for around 97 per cent of all applications.

## Myth three

### *'Britain can ignore Europe on human rights'*

In October 2011 the *Times*' front page headline was 'Britain can ignore Europe on human rights: top judge'.<sup>18</sup> Upon analysis, the headline bore no relation to Lord Judge's comments to the House of Lords Constitution Committee (see from 10:25).<sup>19</sup> It is also based on a fundamental misunderstanding of how the European Convention on Human Rights has been incorporated into UK law.<sup>20</sup>

<sup>15</sup> David Barrett, '102 foreign criminals and illegal immigrants we can't deport' (Telegraph.co.uk, 11 June 2011) <<http://www.telegraph.co.uk/news/uknews/law-and-order/8570639/102-foreign-criminals-and-illegal-immigrants-we-cant-deport.html>> accessed May 2012

<sup>16</sup> Nicholas Watt, 'Conservative conference badge Clarke "regrets" accusing May of laughable attack on Human Rights Act' (Guardian.co.uk, 6 October 2011) <<http://www.guardian.co.uk/politics/2011/oct/06/clarke-condemns-may-attack-human-rights-act>> accessed May 2012

<sup>17</sup> Adam Wagner, 'What the first #catgate appeal judgment actually says' (UK Human Rights Blog, 6 October 2011) <<http://ukhumanrightsblog.com/2011/10/06/what-the-first-catgate-appeal-judgment-actually-says/>> accessed May 2012

<sup>18</sup> Frances Gibb, 'Britain can ignore Europe on human rights: top judge' *The Times* (London, 20 October 2011) 1

<sup>19</sup> Available at <<http://www.parliamentlive.tv/Main/Player.aspx?meetingId=9199>> accessed May 2012

<sup>20</sup> Adam Wagner, 'Can Britain "ignore Europe on human rights"?' (UK Human Rights Blog, 23 October 2011) <<http://ukhumanrightsblog.com/2011/10/23/can-britain-ignore-europe-on-human-rights/>> accessed May 2012

### Myth four

*'We must regain right to kick out foreign criminals'*

A *Daily Express* editorial<sup>21</sup> comment in respect of a European Court of Human Rights deportation decision was riddled with inaccuracies and misrepresentations of the specific case and human rights law generally.<sup>22</sup>

### Myth five

*'Human rights prevented deportation of Phillip Lawrence killer'*

This claim is made regularly by newspapers which are seeking to reduce the European Convention on Human Rights' influence on deportation decisions e.g. see the *Daily Telegraph*:<sup>23</sup> 'The government had been prevented from deporting Chindamo to Italy, where he lived as a child, because of the Human Rights Act'. But Chindamo's case was not decided according to human rights law. As was widely reported<sup>24</sup> at the time of the tribunal decision in 2007, Chindamo's arguments under the Human Rights Act played second fiddle to the main thrust of his case, which was founded on of EU freedom of movement law.<sup>25</sup>

Despite this, the claim has been repeated for years in order to support a campaign against the Human Rights Act. In my view, there are a number of reasons why human rights law is often misreported,<sup>26</sup> all of which can be applied equally to other poorly reported areas of law:

1. Sloppy journalism: Journalists often write articles about court judgments without reading them first, or about trials which they have not personally attended. The latter is a particular problem in relation to family law – see e.g. Mr Justice Bellamy's criticism of the *Daily Telegraph's* Christopher Booker's reporting as 'unbalanced, inaccurate and just plain wrong',<sup>27</sup> a

<sup>21</sup> Stephen Pollard, 'We must regain right to kick out foreign criminals', (Express.co.uk, 30 June 2011) <<http://www.express.co.uk/posts/view/255823>> accessed May 2012

<sup>22</sup> Adam Wagner, 'More poor human rights reporting on Somali foreign criminals case' (UK Human Rights Blog, 30 June 2011) <<http://ukhumanrightsblog.com/2011/06/30/more-poor-human-rights-reporting-on-somali-foreign-criminals-case/>> accessed May 2012

<sup>23</sup> 'Terror relocation rules: why human rights laws are so controversial' (Telegraph.co.uk, 4 October 2011) <<http://www.telegraph.co.uk/news/uknews/law-and-order/8804582/Terror-relocation-rules-why-human-rights-laws-are-so-controversial.html>> accessed May 2012

<sup>24</sup> 'Chindamo deportation barred under EU law' (Politics.co.uk, 22 August 2007) <[http://www.politics.co.uk/news/opinion-former-index/policing-and-crime/chindamo-deportation-barred-under-eu-law-\\$477468.htm](http://www.politics.co.uk/news/opinion-former-index/policing-and-crime/chindamo-deportation-barred-under-eu-law-$477468.htm)> accessed May 2012

<sup>25</sup> Adam Wagner, 'Telegraph wrong again on foreign deportation' (UK Human Rights Blog, 8 September 2011) <<http://ukhumanrightsblog.com/2011/09/08/telegraph-wrong-again-on-foreign-deportation/>> accessed May 2012

<sup>26</sup> A more comprehensive list of human rights myths which have been propagated by newspapers can be found here: <<http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/human-rights-act-myths/index.php>> accessed May 2012

<sup>27</sup> *L (A Child: Media Reporting)*, Re [2011] EWHC B8 (Fam) (18 April 2011) [193]

criticism supported by Sir Nicholas Wall in *X, Y, and Z & Anor v A Local Authority*<sup>28</sup>.

This case has a very interesting history that highlights many of the legal complexities relating to the regulatory and legal sanctions which the Leveson Inquiry is investigating. Although the mother involved was ultimately found by Sir Nicholas Wall to be a fabricator who had coached her daughter to lie about being abused by her ex-partner, her case was taken up enthusiastically by journalists such as Mr Booker and also John Hemming MP, who chose (before Ms Haigh was exposed as a fabricator) to expose the ‘super-injunction’ against her in Parliament.<sup>29</sup> Elizabeth Watson, a ‘private investigator’ who published allegations made by Haigh online, was subsequently sentenced to nine months in prison (later suspended<sup>30</sup>) for contempt of court arising from her blog about the case.

2. No links to primary sources. Newspapers rarely link to primary sources, in particular judgments, which means that online readers are unable to test claims for themselves. This is why UKHRB seeks to publish links to judgments and other primary materials almost as soon as they are available, and I seek to do the same via Twitter. I also campaign regularly for courts to publish more judgment summaries and press releases as the Supreme Court now does to great effect.
3. Lack of dedicated legal correspondents. Legal writer Joshua Rozenberg has told *Legal Week* that many national newspapers no longer have a designated legal correspondent, meaning that they ‘don’t provide the service they did’.<sup>31</sup>
4. Merging of factual and opinion reporting. The boundary between ‘news’ and ‘opinion’ in newspapers has all but disappeared, and this is confusing for readers. Editorial positions often leak into ‘news’ reporting: for example, reporting immigration decisions critically, quoting MPs with particularly strong views on one side of the debate and representatives of think tanks from only one side of the debate.

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<sup>28</sup> *X, Y, and Z & Anor v A Local Authority* [2011] EWHC 1157 (Fam) [102]

<sup>29</sup> Carl Gardner, ‘A cautionary lesson: the Vicky Haigh and Liz Watson judgments’ (Head of Legal, 6 September 2011) <<http://www.headoflegal.com/2011/09/06/a-cautionary-lesson-the-vicky-haigh-and-liz-watson-judgments/>> accessed May 2012

<sup>30</sup> *Doncaster Metropolitan Borough Council v Watson* [2011] EWHC 2376 (Fam) (01 September 2011)

<sup>31</sup> ‘The geek shall inherit’ *Legal Week* (20 October 2010)



5. Wilful/reckless misrepresentation: Some newspapers have mounted campaigns against the Human Rights Act, which is their right, but those campaigns are sometimes bolstered by unbalanced reporting in 'news' articles as well as opinion pieces and editorials. The merging of factual reporting with opinion is particularly damaging when reporting the law. Complex rulings are difficult enough to summarise when just sticking to the facts. Adding another slant to the multiplicity of opinions which are already sewn into the fabric of a legal judgment is dangerous and unnecessary.

The final factor mentioned above, wilful/reckless misrepresentation, is the most insidious. It is also the area where social media can and do help create balance through a free market for ideas. UKHRB regularly criticises articles about law in the mainstream media, as well as 'naming and shaming' journalists, and enough journalists read the blog (many subscribe by email or Twitter) for this to have some impact. For example, the *Daily Telegraph's* Christopher Booker responded directly to my post asking whether journalists need to attend court to report on trials:

I was again attacked last week by a prominent legal blogger, for reporting on cases where the system appears to be going tragically wrong, without having sat for days in court to hear 'both sides of the story'.<sup>32</sup>

## Recommendations

I would counsel against the idea that in future only accredited journalists should be provided with access to certain places or information privileges (as proposed by Paul Dacre in his evidence to the Leveson Inquiry<sup>33</sup>). Although I understand the rationale: providing an incentive to journalists not to lose their press card by way of a disciplinary sanction; this could have a significant detrimental effect on the work of non-professional 'citizen' journalists.

It is also hard to see the justification for rewarding journalists with additional privileges whilst punishing bloggers etc. by removing privileges given that it is the poor ethical conduct of professional journalists that has led to the need for an inquiry into the ethics of the press. The legal blogs mentioned above help to correct bad legal journalism but also improve public understanding of the law. The sheer number, range and quality of legal blogs is in my opinion an excellent example of the public utility which blogging and citizen journalists can provide.

Of course, there are bad blogs too. But any proposed system of regulation which could effect all blogs must be considered very carefully indeed as it risks

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<sup>32</sup> Christopher Booker, 'Vicky Haigh saves her baby from the clutches of the social workers' (Telegraph.co.uk 21 May 2011)

<<http://www.telegraph.co.uk/comment/columnists/christopherbooker/8528171/Vicky-Haigh-saves-her-baby-from-the-clutches-of-the-social-workers.html>> accessed May 2012

<sup>33</sup> Paul Dacre, Oral Evidence to the Leveson Inquiry, 6 February 2012

having a significant chilling effect on the excellent work that many bloggers currently do.

**© Adam Wagner**

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## COURT IN THE NET

*William Perrin draws on his own experiences to set out a new charter for courts transparency, arguing that the current approach ensnares open justice*

Across the UK are hundreds of simple local websites that report community news and events. Crime and anti-social behaviour are the most challenging topics they have to tackle. In London's Kings Cross, where I run a website<sup>1</sup>, the crime issues have been acute from anti-social behaviour to murder and large-scale organised crime. Most local sites do not want to add to local fear of crime by just reporting incidents; we want to publish results and support our local criminal justice professionals in the police, crown prosecution service, courts and prisons. Finding out what is going on in local courts would be very useful.

I want to keep my community informed about what happens at our local magistrates' court where justice is dispensed on our behalf. But as a local website I cannot secure a simple list of upcoming events nor a list of results to publish for all to see. I would like daily court results and timetables posted to a courts website, preferably with an RSS feed. After all, you can go to the court and watch from the gallery or see the screens. I have tried getting basic information from my local magistrates' court but have been defeated. I sought basic material, such as a list of cases and results (i.e. which local people are up in court and who is innocent and guilty) – the type of information that gives people confidence that the system is working.

Journalists complained to me that even though they have a privileged position, their job was not much easier and getting worse. They said that court officers seemed confused or ignorant the complex and overlapping protocols of 'data protection' and 'copyright'. As the resources and reach of the local press declines, the courts and the government should make it easier to get basic justice information to the public, not harder.

In 1911, a paper based system where you queued up in person for a chitty with little certainty of success may have been fine; in 2012 it's wrong; I can't understand why basic information about our courts isn't available online. The courts are awash with procedural paper, presumably generated electronically at some point. It's very simple to publish to the web these days: all you need is access to email to send a Word document or spreadsheet to the publishing services Scribd or Posterous<sup>2</sup>.

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<sup>1</sup> 'King's Cross Environment' <<http://kingscrossenvironment.com/>> accessed April 2012

<sup>2</sup> At: <<http://www.scribd.com>> and <<http://posterous.com/>>

Nonetheless, we ought to expect better of a modern transparent system, costing hundreds of million pounds.

The government appointed me to its Crime and Justice Sector Transparency Panel. With the government's drive to transparency and open data I tried to get to the bottom of the problem of obtaining electronically routine information about local courts. I brokered a meeting between a specialist court reporting and news agency, Central News, and Ministry of Justice (MOJ) officials. The court reporters set out a fairly dysfunctional experience as they sought to get basic, consistent, common sense information from Court officials. MOJ staff were very helpful and undertook to address problems but it struck me that, given the other pressures following the riots in summer 2011, MOJ has an insurmountable managerial task to re-educate court staff in the minutiae of information management.

To my mind the issues are more behavioural. Court staff want courts to be open but they have got into some bad habits and arcane procedures. Much could be done with proper leadership signals and setting out the fundamental elements in plain English. So I offered to write down a simple charter for transparency in the courts, of the sort that the Secretary of State and the Senior Presiding Judge could publish as co-signatories and might fit on one side of paper.

With apologies for my lack of precise legal terminology here is a draft, for the way in which the Senior Presiding Judge and Secretary of State for Justice should set out the following basic principles of openness and transparency for courts of all types. This could also apply to tribunals and coroners' courts with minor adaptation.

### **Draft Courts Transparency Charter**

Courts are open to the public and the media, with only narrow exceptions. This is at the heart of delivery of justice in a modern democracy and a proud national tradition. The government, the judiciary and people who work in courts want courts to be open transparent and comprehensible to the public and the press. But the courts over hundreds of years have evolved into a complex system that is hard for outsiders to understand.

In the interests of transparency and confidence in the justice system, people should be able to find out easily, on the internet:

- what cases are expected to come up in a court from the time that they are scheduled
- name, address and specific charges in all cases available from the time the case is scheduled (see 'criminal cases', below)
- the full names, including first names, of judges, prosecution and defence lawyers, witnesses, and other professionals who speak during proceedings (e.g. magistrates' clerks giving legal advice) from when they are known

- judgments handed down from the end of the working day on which the case is concluded
- next stage of the case

The longstanding openness of courts must not be compromised by data protection or copyright. In particular, well meaning but misplaced concerns about the Data Protection Act 1998 and copyright must not stop the recording and transmission of information presented in open court.

All the above is subject to contempt of court and protection of vulnerable defendants and witnesses – exceptions to immediate transparency that are fundamental to the efficient effective functioning of the justice system. Case information should be flagged where restrictions apply and those restrictions set out in writing.

People who use information illegally or irresponsibly against the interests of efficient, effective justice or in such a way as to compromise the vulnerable may have their access to information withdrawn.

It should be assumed that all information is available to the press and the public, apart from the general exceptions above.

The best courts already meet these principles; we would like all courts to do so.

### *Criminal cases*

In criminal cases, the following basic information should be readily available:

- The full spelling of a defendant's name.
- Their date of birth and full home address, including door number and postcode.
- The charges against them (including an opportunity to read them).
- Written copies of any reporting restrictions applicable in the case.

Charges should be set out in the form used in Magistrates court – 'On 23/07/2011 at Oxford Street, London, assaulted Joe Bloggs contrary to section 39 of the Criminal Justice Act 1988'

### **Moving forward**

Since I first published this Charter online in November 2011<sup>3</sup>, I have discussed many of the issues with experts. There are numerous issues that bear upon simple transparency, each of which requires teasing out:

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<sup>3</sup> 'Would a "Transparency Charter" help make the Courts more open?'  
<<http://talkaboutlocal.org.uk/would-a-transparency-charter-help-make-the-courts-more-open/>>  
accessed April 2012

- Contempt of court or information that might prejudice a trial leading to reporting restrictions.
- Protection of vulnerable people such as children, some victims and witnesses.
- Rehabilitation of Offenders Act 1974 – this gives people a basic right to be forgotten as their convictions become ‘spent’. This can be important for rehabilitation and manifests as a removal of the need to declare a crime in some circumstances and ultimately a removal of the record.
- Data protection and privacy; significantly, the Information Commissioner’s Office (ICO) says that in respect of courts data this will be applied in the context of the ROA 1974, which implies a societal resistance to an indelible record. Very detailed personal information tends to be read out in court such as full name, address and date of birth.
- Copyright; judges, barristers etc. own the copyright to their judgements and argument with no practice in place to waive that, nor grant licences for reuse.
- The lack of a legal underpinning for the traditions of open justice.
- IT systems; it is very simple and very cheap today to publish basic documents to the web of the sort produced in courts. But we need to understand what is held in MOJ data systems. A simple start would be to experiment with a court that has a presiding judge or magistrate and chief clerk that want their court to be as open as possible.

We have not as yet seen an attempt to work through this stack of issues. I am concerned that tackling these issues one at a time will entail bureaucratic inertia, which risks steadily undermining the tradition and practice of open justice. Open justice is sufficiently valuable in society such that we need rapid, decisive action to reaffirm our national commitment and re-establish open justice for the modern internet age.

Given that we have had open justice for centuries, there is a good case for putting the burden of proof of harm upon people who might seek to constrain open justice. This requires decisive action by leading judges, the Lord Chief Justice and the Senior Presiding Judge, and the Secretary of State of Home Secretary along the lines of the draft charter.

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*William Perrin is a community activist in King’s Cross London, founder of the Talk About Local online community enterprise and member of the government’s Crime and Justice Sector Panel on Transparency.*

# TWITT(ER)ING OPEN JUSTICE?

*Taking a comparative perspective, **Professor Ian Cram** examines threats to fair trials in 140 characters – and identifies a common problem*

This paper takes as its focus some current threats posed to the administration of justice in both the United Kingdom and the United States. Both jurisdictions are experiencing similar problems which concern the flow of electronically-held information into and out of the jury room. It will be seen that the strong protection afforded to such speech under the First Amendment means that even where it is highly prejudicial, no action can be taken against media organisations or providers of electronic social media. Instead, emphasis is placed on insulating jury members from material that is not part of the criminal trial proceedings. By contrast, jury members who undertake private research into aspects of the trial are not in the same position as media organisations and risk being found in contempt in much the same way as jurors in England and Wales.

The questions which this brief paper sets out to explore are as follows: i) what sorts of threat does technology and the electronically-equipped juror pose to the fairness of criminal jury trials and ii) what possible responses might the criminal trial system make to counter any adverse impact on trial fairness/integrity. To start with however, the constitutional context in which recent developments in the United States have occurred is set out.

## **US First Amendment**

*Congress shall make no law... abridging... freedom of speech or of the press...*

Most of us are familiar with this famous constitutional command. For present purposes, it is the application of the First Amendment to the reporting of court proceedings and, more broadly, to speech about matters pending before the courts that is of relevance. The underlying rationale for broad protection in the case of speech about courts and legal proceedings is to be found in the ideal of republican self-government. As Brennan J observed in the context of a successful challenge to an order closing a criminal trial to media and members of the public alike:

[T]he First Amendment ...has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is ... (the) assumption that valuable public debate – as well as other civic behavior – must be informed.<sup>1</sup>

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<sup>1</sup> Brennan J in *Richmond Newspapers v Virginia* 448 US 555, 587 (1980)

Courts are entrusted with the exercise public power in the process of trying defendants in criminal cases and it follows that the public or community on whose behalf this power is exercised has an interest in learning about court proceedings. Knowledge of court proceedings and surrounding issues is vital therefore to the informed participation by citizens in public affairs. That is not to say that restrictions on court-related speech could never be justified, it is rather that there is an extremely heavy constitutional burden on the state to show why the media should be prevented from commentating on pending/actual proceedings. This burden is expressed in the 'clear and present danger' standard. Essentially, this requires the state to show that the speech in question poses a clear and present danger of immediate and substantial harm (to say the administration of justice or a defendant's fair trial rights) and that the restriction imposed on speech advances the governmental interest by minimally impairing the exercise of First Amendment freedoms. In effect, the standard means that *sub judice* contempt rules are wholly unconstitutional. In the case of prior restraints (or gag orders), these become extremely hard to obtain, though not impossible.

As the American Bar Association puts it in ABA Standard 8-3.1:<sup>2</sup>

Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.

Even in cases where the publicity does cause a trial to be delayed and transferred to a different venue, the ABA guidance goes on to state that:

No legal penalty or obligation may be imposed on reporters to avoid publicity about a case. No legal penalty may be imposed for even the most intense, exaggerated, biased or 'hyped' coverage of any criminal case (except the remedies provided by successful libel suits).

### **Safeguarding criminal trials – the First Amendment way**

The obvious question to arise from the presumptive unconstitutionality of restraints on prejudicial pre-trial and during trial publicity is how does the US system uphold the defendant's Sixth Amendment right to a fair trial. Consider the murder trial of OJ Simpson. Apart from the saturation television and news media coverage during the trial itself, which many considered to be hostile to the defence (it turned a serious criminal trial into an entertainment in which the lawyers and witnesses were competing for the ten second soundbite to kick off TV networks' evening news programmes), there was also the prejudicial material aired by media organisations.

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<sup>2</sup> 2006, 3<sup>rd</sup> edn and 'The Reporter's Key - Access to the Judicial Process'

<[http://www.abanow.org/wordpress/wpcontent/files\\_flutter/1273614736\\_20\\_1\\_1\\_7\\_Upload\\_File.pdf](http://www.abanow.org/wordpress/wpcontent/files_flutter/1273614736_20_1_1_7_Upload_File.pdf)> accessed May 2012

This material was broadcast after Simpson was formally brought before the court for the first time to be told the charges he would be facing and famously included audio recordings of the 911 calls made by the victim on two previous occasions, including the time when Simpson broke a door to gain forcible entry. Nicole Brown Simpson is clearly heard to tell the emergency switchboard in a sobbing voice, 'He's back', 'I think you know his record', 'He is crazy'; at the time of these broadcasts, the admissibility of the 911 calls had yet to be determined.

Accepting the serious potential for such material to cause prejudice to the fairness of particular trials, the criminal trial process in the US lays emphasis upon the range of curative measures that can be deployed to safeguard Sixth Amendment fair trial rights. These include the voir dire, changing the venue or start date of trials or, in extreme cases, such as Simpson's, sequestering the jury.

### **An electronic threat to fair trials**

The OJ Simpson case brought together a combination of elements (celebrity black defendant and role model in an ethnic community; violent crime against his white wife, a racist police officer, flamboyant lawyers happy to play to the cameras) elements that do not usually present themselves in the one criminal case before a jury of twelve men and women.

In 2012, a pressing threat to the fairness of jury trials would seem to come from within the trial process itself – namely the juror. Compared to previous generations, jurors today are much more likely to be electronically equipped and adept at tweeting, blogging, sending and receiving instant messages and Facebook updates. The modern juror is also accustomed to acquiring knowledge about events and individuals via Wikipedia and Google.

In the celebrated 1957 film directed by Sidney Lumet, *Twelve Angry Men* Juror No 8 (whose character is played by Henry Fonda) is the one juror in a murder trial who initially stands alone in expressing doubt about the defendant's guilt. At one point in the deliberations, he produces a knife that is identical to the weapon said by the prosecution to have killed the victim. This action is central to the undermining of the prosecution's case and helps persuade the other jurors to doubt their original conclusions of guilt. For present purposes, what is of interest here is that Juror No 8 has done his own research and brought the product of this research into the jury room – something that is wholly contrary to the adversarial nature of criminal trials. The prosecution has no chance to rebut the pro-defendant inference which is suggested by the juror's private inquiries.

Today, the twittering/electronic juror might be thought to pose a different kind of threat to that created by Juror No 8 in *Twelve Angry Men*. At one level though the same challenge is posed to the criminal jury trial in which extraneous material (i.e. material not admitted in evidence to the court, and thus not tested



through the adversarial clash between prosecution and defence) finds its way into the jury room.

As is well known, Twitter offers a micro-blogging text service – each time in 140 characters whereby users of the service can post tweets for others to read and respond directly to. Internet links can also be posted and accessed. It is a powerful way of discovering what is happening just now and also participating in discussion of those events.

### **Problematic information flows in the electronic era**

We can think of electronic media as posing two distinct sorts of challenge to criminal court proceedings. In the first type of challenge, untested information/material flows *into* the jury room, for example when a juror does private internet research away from the courtroom and later discloses the results to fellow jurors during their deliberations. Secondly, there may a problematic flow of information/opinion *away* from the jury room. This could arise via tweet updates on jury room experiences – including deliberations or simply ‘blogging’ about the experience of jury service.

#### *Why might disclosure of a juror’s private research to fellow jurors be troublesome?*

Two main reasons can be advanced here; first as was seen above, it introduces untested and possibly prejudicial material into deliberations. This undermines rules of evidence as there is no opportunity for prosecution/defence to challenge the products of private research. It is also costly where, as a result of the outside interference, a retrial is ordered. Not only is there a financial cost in a retrial, there is also a risk of additional trauma for victims and witnesses caught up in the proceedings when they have to return to court at a later date.

#### *What threats are posed when information/opinion leaves the jury room?*

The obvious concern here is that the finality of jury verdicts will be undermined, a feature of English criminal trials that is underpinned by s.8 of the Contempt of Court Act 1981.<sup>3</sup> Separately, it may be thought that juror to juror exchanges would be inhibited and therefore quality of jury deliberations adversely affected.

#### *What is happening in practice?*

It is becoming clearer that for a new generation of jurors, the temptation to go online during trial proceedings is difficult to resist. Research by Cheryl Thomas for the Ministry of Justice in 2010 disclosed that between 5% and 12% of 668 jurors admitted to researching case details on the internet.<sup>4</sup>

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<sup>3</sup> See *AG v Scotcher* [2005] UKHL 36 on the limited scope of disclosure available to jurors who have concerns about the safety of criminal convictions.

<sup>4</sup> <<http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf>>

In January 2012, juror and university lecturer Theadora Dallas was jailed for breaching the trial judge's direction not to search internet for trial related materials. She had told fellow jurors what she had found about defendant (including a previous rape allegation). Her actions caused the trial to be halted.<sup>5</sup>

Seven months previously in separate proceedings, another juror Joanna Fraill discussed the progress of jury deliberations on Facebook with a defendant who had been earlier been acquitted in the same proceedings and whose co-defendant (and boyfriend) was waiting to learn his fate. Fraill admitted revealing details of jury deliberations and also doing a Google search on the co-defendant. She was jailed in June 2011 for 8 months.<sup>6</sup>

For some devoted (and possibly addicted) users of social media, the prospect of a lengthy spell of jury service is less than welcome. In Oct 2009 one person summoned for jury service tweeted 'Wow. Jury Duty. First Time ever. Can I be excused because I can't be offline for that amount of time?'

In the next section, technology-induced mistrials and near mistrials in the United States are briefly discussed. These may point up some difficulties that may lie ahead in our own courts. This is followed by discussion of a range of official responses that have been employed to combat threats to the integrity and fairness of jury trials

### **The US Experience**

A snapshot of the first six months of 2009 reveals a flavour of technology-induced mistrials or near mistrials.

1. March 2009: collapse of a federal drugs trial in Florida after 8 out of 12 jurors admitted private online research into defendants' names and definitions of medical terminology. The trial was in its seventh week when the judge halted the trial.<sup>7</sup>
2. July 2009: political corruption trial against a former state senator – juror tweeted during trial and made posts to his Facebook page – defence motion for a mistrial rejected on the basis that the juror had not read any of the tweets posted to him in response of his original tweet. There had been no flow of information into the jury's deliberations and therefore no prejudice had been caused to the trial.<sup>8</sup>

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<sup>5</sup> O Bowcott, 'Juror jailed over online research' *The Guardian* (London 23 January 2012) <<http://www.guardian.co.uk/law/2012/jan/23/juror-contempt-court-online-research>>

<sup>6</sup> J Deans, 'Facebook juror jailed for eight months' *The Guardian* (London 16 June 2012) <<http://www.guardian.co.uk/uk/2011/jun/16/facebook-juror-jailed-for-eight-months>>

<sup>7</sup> D Funcheon, 'Jurors Gone Wild: the Feds Slink Away from a Flubbed Internet Pharmacy Case' *Miami New Times* (Miami, 23 April 2009) <<http://www.miaminewtimes.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/>>

<sup>8</sup> J Schwarz, 'As Jurors turn to Web, Mistrials are Popping Up' *New York Times* (New York 18 March 2009) <<http://www.nytimes.com/2009/03/18/us/18juries.html>>

### **Why do jurors engage in private research?**

An informed policy response to jurors' use of social media and electronically available materials ought to be based upon the reasons why jurors engage in such practices. Several such reasons suggest themselves viz:

1. A curiosity to gain background information on key participants in trials.
2. A belief that justice will be better served if more not less 'information' is before the jury.
3. Cultural reasons; the younger (and not so young!) juror is accustomed to finding information online and has the technological means (Iphones, Blackberry etc.) and expertise to reach online material. More generally perhaps a dependence on instant communication to friends/access to information.

### **Possible responses**

One fairly drastic solution might be to ban iPhones, Blackberries etc. from the courtroom. An obvious difficulty here is that such a move doesn't stop out of court communications/information flow. An alternative approach may be for the trial judge to make explicit both the type of technology that jurors are prohibited from using and importantly the reasons why these technologies are being restricted. An example might be, 'Google Earth may not be used to check location details in the present case' or, 'Twitter updates on progress of trial to followers are strictly prohibited'. Jurors would then be told that unless they are each able to abide by the instruction, then it may become necessary to sequester jurors until a verdict is delivered. This type of instruction has been used in US courts.<sup>9</sup>

One possible downside to this approach is that a technology-specific rule is likely to be under-inclusive as technology progresses, so any rules will need regular updating. One US juror is thus reported to have blogged as follows: 'Hey guys! I know that jurors aren't supposed to talk about their trial, but nobody said that they couldn't live blog it, right? Am I right or am I right?!?!'

By contrast, more generalised instructions for example 'do not use the internet to research the case' 'do not talk about the trial to others' may cause confusion among jurors about what precisely is covered.

Perhaps more need to be done by way of educating jurors about the reasons why the use of electronic devices is prohibited and spelling out clearly which devices are prohibited and when the prohibition ceases. Judges may also want to spell out clearly the serious consequences of breaching any instruction and remind jurors of the Frail and Dallas cases, both of which resulted in custodial sentences. Other avenues worth considering include offering encouragement to fellow jurors to inform

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<sup>9</sup> D Shelton, 'No Googling—No Texting' Jury Instruction Video, National Center for State Courts  
<<http://www.ncsc.org/Topics/Jury/Jury-Selection-Trial-and-Deliberations/Resource-Guide.aspx>>

promptly on jurors who fail to adhere to the instruction prohibition; requiring jurors to make a declaration of non-use of specified devices at the start and conclusion of trial.

At a deeper level however, some instances of juror misconduct may reflect an inappropriately casual attitude towards the important and solemn function of determining the guilt or innocence of fellow citizens. Yet at other times, it might be argued that the inquisitive juror who engages in private research to further their understanding of the case and its background is an entirely different individual to the casual juror – one who takes his/her civic responsibilities entirely seriously and wants to deliver the right verdict. This person is avid for more information and is not content for the legal experts to have the stage solely to themselves. To meet the concerns of this type of juror, thought may need to be given to the idea of moving away from wholly adversarial trials thereby allowing jurors a more active role within proceedings than they currently enjoy. This would perhaps offer a means of satisfying the curious (and conscientious) juror who has his/her own questions about the events at issue in the trial and remove a principal reason for online activity. One problem with this approach is that jurors may well want to ask of the judge is: ‘Does the defendant have previous convictions?’ and they may not be receptive to the judge’s response as to why that information cannot be given. There is however research in the United States which suggests that some judges (in trials in New York and Pennsylvania) view as a positive experience the practice of allowing jurors to submit written questions during the course of the trial.<sup>10</sup> Perhaps this is something that the English and Welsh criminal court system should be open to exploring.

© Ian Cram

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<sup>10</sup> C Morrison, ‘Jurors behaving badly’ (2011) 62 *Hast LJ* 1597; J Turgeon & E A. Francis, ‘Improving Pennsylvania’s Justice System Through Jury System Innovations’ (2009) 18 *Widener L.J.* 419, 449



# JUDICIAL PERSPECTIVES ON OPEN JUSTICE AND SECURITY

***Dr Lawrence McNamara*** examines how the judiciary contributes to legal reform through ‘extra-judicial’ statements

This paper<sup>1</sup> examines how the judiciary are present in and contribute to law reform processes through ‘extra-judicial’ statements (i.e., statements made other than in judgments). It focuses on recent debates about open justice, especially in matters of terrorism and security. It aims to explain why judicial contributions are largely absent from these law reform debates, to critically consider the implications of that absence for contemporary debates surrounding proposed reforms to the management of evidence in civil proceedings, and to suggest some avenues for the expression of further, legitimate extra-judicial statements.

A brief explanation of the government’s proposals to introduce ‘Closed Material Proceedings’ (CMPs) into civil proceedings generally will be helpful. The proposals arose from a small number of civil cases involving Guantanamo detainees which the government claimed it could not adequately defend without disclosing sensitive information that would risk damage to national security. The government sought to use CMPs but the Supreme Court held in *Al Rawi* that the common law did not allow for CMP in civil actions and that legislation would be required if the government wanted that path to be available.<sup>2</sup>

The government published the *Justice and Security* Green Paper on the issue in October 2011, proposing the use of CMPs in civil proceedings generally and seeking responses by 6 January 2012 as part of the consultation.<sup>3</sup> Of 90 responses received, 84 have been published. They are from a wide range of government agencies, lawyers (including special advocates who currently work within CMP systems), policing agencies, NGOs and others.<sup>4</sup> There is no response from the judiciary in England & Wales.

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<sup>1</sup> The author runs the *Law, Terrorism and the Right to Know* research project at the University of Reading. The project is funded under the RCUK ‘Global Uncertainties’ research priority. Contact: [www.reading.ac.uk/LTRK](http://www.reading.ac.uk/LTRK) and [l.mcnamara@reading.ac.uk](mailto:l.mcnamara@reading.ac.uk). My thanks to Sam McIntosh for comments on this paper.

<sup>2</sup> *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34

<sup>3</sup> *Justice and Security* (Green Paper, Cm 8194, 2011)

<sup>4</sup> The remaining six responses have not been published because, the Cabinet Office indicates, the authors have not yet consented to publication. However, the Cabinet Office has published a summary of those six identified the authors as ‘4 individual members of the public and 2 are private companies’: Cabinet Office, ‘Responses to the Consultation’:

<<http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>> (Last accessed: 18 March 2012)

### **Judicial views: from judgments to ‘judicial engagement’**

In judgments, judicial views are often expressed strongly. The *Al Rawi* decision contains clear views on security, fair trials and open justice. For instance, Lord Brown, stated that the general adoption of closed procedures would damage ‘the integrity of the judicial process and the reputation of English justice.’<sup>5</sup> Lord Dyson said that open justice is a fundamental feature of common law trials and of British justice.<sup>6</sup> Lord Kerr saw closed procedures as problematic because they prevented evidence being adequately challenged: ‘To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.’<sup>7</sup> In extra-judicial statements, judges will usually be more circumspect.

#### *The traditional views and their development*

The position has changed over time. Under the ‘Kilmuir rules’ of 1955 judges remained silent on ‘the controversies of the day’ to ensure that the ‘reputation for wisdom and impartiality remain[ed] unassailable.’<sup>8</sup> The ‘Mackay Rules’ in 1987 removed the general view that judges should stay silent and, in view of the principle of judicial independence, said it was up to each judge to decide for themselves whether and how they wished to take part in public debate.<sup>9</sup> The most recent high watermark is found in March 2012 when the principles under which judges may speak extra-judicially were discussed by one of the most senior judges, the Master of the Rolls, Lord Neuberger.<sup>10</sup> His analysis warrants some attention as it sets out some proposed principles which may shape judicial contributions to public debate for some years to come.

Lord Neuberger argues that judges have not been completely restricted from entering into contemporary debates. Even under the Kilmuir rules, he argues the senior judiciary could ‘comment on matters which affect[ed] the proper administration of justice; that is to say on matters which impinge on the judicial branch of the State; on the court’s ability to fulfil ... its constitutional function of doing justice.’<sup>11</sup>

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<sup>5</sup> *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, [83]

<sup>6</sup> *Ibid*, [10]-[11]

<sup>7</sup> *Ibid*, [93]

<sup>8</sup> AW Barnett, ‘Judges and the media – the Kilmuir rules’ [1986] Public Law 383. This short piece made public for the first time and published in full a letter from the Lord Chancellor to the Director-General of the BBC which contains what is thought of as the Kilmuir rules. In a brief introduction Barnett observes (383), ‘the essence of that letter has no doubt since been refined by later Lord Chancellors and their advisers into a statement that may be brought to the attention of judges when necessary.’ However, the substance of the rules would appear to have remained constant.

<sup>9</sup> Lord Neuberger of Abbotsbury, Master of the Rolls, ‘Where Angels Fear To Tread: Holdsworth Club 2012 Presidential Address’ 2 March 2012

<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf>> (Last accessed: 18 March 2012) (‘Neuberger, “Where Angels Fear to Tread”’)

<sup>10</sup> *Ibid*, [18]

<sup>11</sup> *Ibid*, [17], references omitted

Independence ‘can be compromised through the judiciary being drawn into discussions with the executive and legislature, which, for instance, call on the judiciary to offer legal advice, to comment on the lawfulness or constitutionality of policy or proposed legislation.’<sup>12</sup> In the legislative context the main intersection has occurred where the judiciary have given evidence to Parliamentary committees.<sup>13</sup> But, as Lord Neuberger explains, the lines are clearly understood by all concerned: ‘Judges cannot, for instance, comment on individual cases. They cannot comment on political matters or matters of public policy, but can rather comment on the practical consequences of certain policy choices. Most pertinently they cannot offer such committees legal advice, just as they cannot provide the executive with legal advice.’<sup>14</sup>

The Constitutional Reform Act 2005 has brought about a more complete separation of powers, especially through the judiciary’s departure from the House of Lords. Lord Neuberger points out that it ‘reduced the avenues by which the Judiciary could enter into public debate, so the remaining avenues are almost inevitably likely to be more travelled.’<sup>15</sup> However, it does not necessarily lessen the imperative for – or practice of – judicial caution.

### *Lord Neuberger’s principles*

Against that background Lord Neuberger makes his own contribution to the framework within which judicial engagement should occur.

The foundations of the principles lie in ‘mutual respect’, especially between the judiciary and the executive. It is ‘quite inappropriate’ for politicians to criticise judges or their decisions.<sup>16</sup> If they ‘slang each other off in public’ it undermines the constitution, democracy and the rule of law.<sup>17</sup> Mutual respect means ministers and judges ‘must respect the other’s turf and not trespass on it.’<sup>18</sup> It means judges ‘should not answer back’; it is ‘unseemly and more undermining’ to do so.<sup>19</sup> However, it does not mean that judges should not speak at all. On the contrary, Lord Neuberger says extra-judicial comments have ‘more benefits than drawbacks.’<sup>20</sup>

This is fundamentally right. The individual and collective experience of the judiciary, and their established constitutional role, means they should contribute to public debate about substance and processes of justice. The challenge is how they should do so without compromising the constitutional roles of any branch of the state.

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<sup>12</sup> Ibid, [25]

<sup>13</sup> For example, the Lord Chief Justice and the President of the Queen’s Bench Division both gave evidence to the House of Lords Select Committee on the Constitution: Sixth Report of session 2006-07, Relations between the executive, the judiciary and Parliament (HL 151, 11 July 2007)

<sup>14</sup> Neuberger, n 9, [29]

<sup>15</sup> Ibid, [34]

<sup>16</sup> Ibid, [36]

<sup>17</sup> Ibid, [37]

<sup>18</sup> Ibid

<sup>19</sup> Ibid, [36]

<sup>20</sup> Ibid, [54]



Lord Neuberger attempts to shape the engagement rules by formulating seven principles.<sup>21</sup> I will, with respect, re-formulate these into two principles that might be more easily applied. The first is freedom. It is concerned with scope and limits of when a judge should be able to speak. The second is caution. It is concerned with whether a judge who is legitimately able to speak should choose to do so. In this framework the principles are:

1. Judicial freedom: Subject to the caveat that they should not seek publicity for its own sake or for causes, judges should be free to comment extra-judicially on ‘a wide range of issues’. These include, but are not limited to, ‘areas such as constitutional principles, the role and independence of the judiciary, the functioning of the legal system, and access to justice, and even important issues of law.’ (*These are Neuberger principles six and one.*)
2. Judicial caution: Even if free to comment then, before deciding whether to do so, a judge should carefully consider the potential effects any comment may have on:
  - (a) the separation of powers. The judge should pay careful consideration to the importance of judicial independence from both the legislature and the executive. (*Neuberger principles two and four.*) This is especially important where the proposed comment will address ‘politically controversial issues, or matters of public policy’. The judge should consider the potential affects in light of both the substance of the proposed comment and the terms in which it will be made. A judge should not trespass on the territory of the other branches of the state, and reticence may be preferable at the territorial borders. (*Neuberger principle four.*)
  - (b) the individual judicial independence of the judge. Very importantly, a judge must consider whether the specific issue may later arise for determination in court. If it may then the judge should make it very clear that ‘the judicial mind is not closed.’ A judge should also consider the audience and the impact a comment may have. In particular, she or he should consider whether, if disseminated widely (including via the media), it might call into question ‘their ability to carry out their fundamental role of doing justice according to law.’ (*Neuberger principles two and five.*)
  - (c) the institutional independence of the judiciary generally. A judge should take account of the reputation and standing of the judiciary in all the circumstances at the time. Those circumstances include considering the

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<sup>21</sup> Ibid, [46]-[53].

frequency, nature and content of comments he or she has made previously, and which other judges have made. A judge should also include consideration of the most appropriate way to express differences of opinion with other judges. A judge should note particularly that the Constitutional Reform Act 2005 makes the Lord Chief Justice the head of the judiciary in England and Wales, and only in exceptional circumstances would it be appropriate to comment if the view was 'on a policy or constitutional issue which is inconsistent with [the LCJ's] position.'<sup>22</sup> (*Neuberger principles three and seven.*)

Lord Neuberger's principles put judicial engagement on firmer ground and a more explicit constitutional footing than in the past.

Judges will still inevitably be cautious of any public engagement with audiences outside the legal profession. Most will remain silent or traditionally cautious in discussion of any contentious issues, and rightly so. At the very senior end of the spectrum, though, while they will choose their battles carefully, Lord Neuberger may have laid the ground for some interesting and well-chosen comments in the next couple of years.

What, then, might this mean for judicial contributions to debates where terrorism and security are concerned?

### **Judicial views on security, terrorism and the Green Paper**

Judicial comments on terrorism laws are rare but not unheard of. Sir Adrian Fulford published a piece after presiding over the trial of men accused of the failed '21/7' bombings in London.<sup>23</sup> Judges in other jurisdictions have also published work in the area.<sup>24</sup> These have been reflective comments. When looking forward, however, the type of forthright views expressed by the Supreme Court in *Al Rawi* would be less likely to be advanced in extra-judicial comments. Terrorism and security matters are regularly the subject of legislative activity and are almost certain to come before the court in a wide and perhaps not always predictable range of circumstances. In Lord Neuberger's terminology, they fall squarely into the category of matters which may come before the court, and which are of considerable political controversy.

However, extra-judicial comments are not precluded. Lord Neuberger himself spoke in 2011 about closed proceedings, open justice and security concerns. He described closed proceedings as 'a clear derogation from the principle of open

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<sup>22</sup> Ibid, [49]. The Master of the Rolls is ambiguous here. It is not clear whether the phrase 'inconsistent with his position' means inconsistent with the LCJ's position on a policy or constitutional issue, or inconsistent with the LCJ's position as head of the judiciary. I have presumed it means the former.

<sup>23</sup> Sir Adrian Fulford, 'Terrorism trials in the new century: How have things changed since the IRA trials?' (2008) 48 *Medicine Science Law* 185

<sup>24</sup> For example, Justice A G Whealey, 'Difficulties in Obtaining a Fair Trial in Terrorism Cases' (2007) 81(9) *Australian Law Journal* 743-759

justice', but noted that the courts will sometimes be closed and Parliament can legislate to limit open justice:

[O]pen justice is a sacred part of our constitution and our administration of justice. But ... in certain, narrowly defined circumstances, the general principle can, indeed must, be set aside.<sup>25</sup>

The extra-judicial technique is to emphasise the importance of the issues without trespassing into the territory best occupied by other branches of the state. By contrast, the judgments in *Al Rawi* addressed more specifically what the appropriate balance is.

### *The Justice and Security Green Paper*

There is little judicial contribution to the Green Paper debates, or at least little that is visible. The Justice Secretary, Ken Clarke, explained in evidence to the Joint Committee of Human Rights' Inquiry into the Green Paper what the judicial contribution has been.<sup>26</sup> The evidence is extracted at some length below, with the questions, as it shows the relationship between the three arms of the state and the adherence to traditional principles.

**Q 210 Baroness Berridge:** ... [W]e are dealing with an unusual situation here where we are considering a form of judicial process. Have you had representations from the judiciary in relation to the proposals in the Green Paper, and if so what representations have been made?

**Mr Clarke:** I have discussed it with the ... Lord Chief and the two High Court judges who he asked to consider this matter and discuss it with me. One thing we are absolutely clear about is judges do not advise Ministers on matters of policy. Judges will discuss the broad issues involved, will discuss their experience of these cases, will certainly offer points about procedure, process and how they would best like to do their job, but in the end separation of powers is such that the judges have to reach a point where they retreat and say, 'That is a matter for Parliament, that is a matter for you Minister, a matter for whether Parliament is going to agree with you; I cannot advise you on that'.

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<sup>25</sup> Lord Neuberger of Abbotsbury, Master of the Rolls, 'Open Justice Unbound?' Judicial Studies Board Annual Lecture, 16 March 2011

<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-jsb-lecture-march-2011.pdf>> (Last accessed: 18 March 2012), [44, 51-60], references omitted.

<sup>26</sup> Joint Committee on Human Rights, Inquiry into The Human Rights Implications of the Justice and Security Green Paper, Evidence of the Secretary of State for Justice, 6 March 2012

<[http://www.parliament.uk/documents/joint-committees/human-rights/JCHR\\_6\\_March\\_transcript\\_UNCORRECTED.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_6_March_transcript_UNCORRECTED.pdf)> (Last accessed: 18 March 2012) Audio: 15:58:57

**Q 211 Mr Shepherd:** And the Law Officer?

**Mr Clarke:** [We all]<sup>27</sup> have contact with the judiciary, and certainly the Attorney and the Solicitor have regular contact, and I have had meetings on this subject with judges, but you can only take it so far. They want to know what we are contemplating, and I want to know what their view and process are, but we are all very clear that they cannot give advice on policy to the Government of the day.

**Q212 Baroness Berridge:** I just want to follow that up. I know they can only go so far, but Parliament is involved in this scrutiny process now and when the legislation is put forward. Will Parliament have the opportunity of hearing those representations that the judiciary have made?

**Mr Clarke:** We are proceeding on the basis that we will publish the responses we have had to the consultation-the written ones, that is-if the consultees agree, and most we have released. I do not think the judges have put in any written evidence, and I can only say that, if the Select Committee want to hear from judges, have a go at the Lord Chief Justice, but I am not sure he will agree to come. He would want all kinds of reassurances about what kinds of questions he will be asked, and no judge will appear here and give an opinion on our Green Paper and the merits of it. .... You would not have the faintest chance of persuading them to do that. Nor do they express their view to me either: 'Yes, we agree with that; no, we do not agree with that'. ...

**Q213 Baroness Berridge:** Do you appreciate, though, our concern that a limited amount of representation has been given of the judicial view to the Executive and to the Lord Chancellor, which will not then be given to Parliament?

**Mr Clarke:** I cannot compel judges to respond to a consultation process, nor can I compel judges to appear before Parliament. The judges are right to be highly sensitive to the circumstances in which they might do that, but they do sometimes come and appear before Select Committees. I assure you, I have not debated with any judge the merits or otherwise of any part of this by way of a discussion on policy. I have had general discussions. The judges are quite scrupulous, and they are not going to start getting drawn into whether or not they agree with a Minister on an item of policy. They will not do that even when they are talking in private to a Minister.

The Justice Secretary's answer to question 212 was slightly erroneous. There is one very brief written judicial response from the Lord Chief Justice of Northern Ireland, submitted by his legal secretary to the Cabinet Office as a Green Paper consultation response. It reads, in full:

The Lord Chief Justice has asked me to indicate that these proposals may have considerable implications for the conduct of inquests in Northern Ireland, but that as the proposals are policy matters and may give rise in any event to the need for

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<sup>27</sup> The uncorrected transcript, *ibid*, reads: 'The law have contact ...' but on the recording it is clearly audible that the phrase is 'We all have contact ...': Parliament TV, Joint Committee on Human Rights, Committee Room 8, 6 March 2012, 16:00:02  
<<http://www.parliamentlive.tv/Main/Player.aspx?meetingId=10435>>, (Last accessed: 18 March 2012)

judicial decisions the judiciary of Northern Ireland does not intend to respond further.<sup>28</sup>

The letter embodies the reticence and arm's length of established principles but provides absolutely no substantive indication of what the 'considerable implications' might be. It seems perhaps overly cautious but, given the potential for judicial decisions ahead, the caution is understandable.

Is there a problem with such a great absence of judicial input into the Green Paper debates? And is there a way around it?

## Conclusion

There is good reason for judicial caution in engaging in extensive extra-judicial debates surrounding the Green Paper. Lord Neuberger's mutual respect foundations dictate this in all the circumstances. For the most part, there is not a great problem with the minimalism of extra-judicial contributions to the Green Paper debates. While Lord Neuberger is correct that, on the whole, extra-judicial contributions to debate have more benefits than drawbacks, that would probably not be the case here. These are high stakes issues. The separation of powers, the constitutional integrity of the arms of the state and the individual and institutional independence of the judiciary are not to be trifled with. However, there are some distinct concerns and opportunities that arise and which could be addressed even within that framework.

First, the principles of mutual respect which oblige judges to limit their extra-judicial comments arguably place a concomitant obligation on the executive to treat with respect the judicial views that are expressed within judgments. In the Green Paper, there is not a considered treatment of the scope and depth of the views in *Al Rawi* which are critical of the proposition that closed material proceedings would be appropriate in civil cases. As the consultation response by the Special Advocates observes, these judicial views 'have not been recognised or addressed in the Green Paper.'<sup>29</sup>

Secondly, there have been discussions between the executive and the judiciary (as the Justice Secretary told the JCHR), but those remain hidden from view. This is highly unsatisfactory. It is not clear what those representations or conversations involved. It seems from the Justice Secretary's evidence that they went beyond the minimal scope of the letter regarding the Northern Ireland inquests, and moved at least into observations based on experience, though certainly not delving into policy

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<sup>28</sup> Letter from Claire Archbold, Legal Secretary to the Lord Chief Justice, to the Justice & Security Consultation, Cabinet Office, 6 December 2011, complete text of letter. Published as Response 82, 'Lord Chief Justice of Northern Ireland', <[http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/02/xx\\_NI\\_Judiciary.pdf](http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/02/xx_NI_Judiciary.pdf)> (Last accessed: 18 March 2012)

<sup>29</sup> A McCullough QC, M Chamberlain and 56 others, 'Justice and Security Green Paper: Response to Consultation from Special Advocates', [16], Published as Response 9, 'Special Advocates' <[http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09\\_Special%20Advocates.pdf](http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf)> (Last accessed: 18 March 2012)

or legality views. As Baroness Berridge points out, the legislation involves a form of judicial process, and parliament will not get to hear the representations that the judiciary have already made. This lack of openness does not enhance the transparency which is appropriate under the separation of powers. While the Parliamentary committee could ask judges to appear, that is also not entirely satisfactory. A better path is to have a formal, written and open expression of views so that both the executive and the legislature – and the public – have access to the representations that have been made by the judiciary.<sup>30</sup>

Thirdly, and following from this, there is good reason to put those contributions on a formal footing. In Lord Neuberger's framework there is constitutional room to do so. Where policy 'goes to the heart of the functioning of the judicial branch' then comment is not merely permissible, but there is arguably a judicial duty to comment.<sup>31</sup> It might well be thought that closed proceedings, access to evidence and evaluation of evidence fall into that category.

The Judges' Council would be one possible body, though it was said at an expert meeting in 2006 (and it appears members of the judiciary there subscribed to this view) that the Council 'would be unsuitable for this task as it is undemocratic, hierarchical, and has no mandate to bind the judiciary as a whole.'<sup>32</sup> However, if a suitable representative body could be identified then it would avoid it falling to individual judges to give evidence to committees, which rightly concerns Lord Neuberger.<sup>33</sup> It might pay attention to international experience as a guide. The Judicial Conference of Australia (JCA), for example, upon invitation made a submission to the parliamentary committee that was inquiring into a Bill concerning mandatory sentencing.<sup>34</sup>

Finally, judicial participation in research provides a fourth avenue for engagement. In the field of terrorism and security, the *Law, Terrorism and the Right to Know* project has done some substantial work in this area.<sup>35</sup> With the support of the senior judiciary and the assistance of officials in the office of the Lord Chief Justice, a number of judges have participated as interviewees, including several who have presided over terrorism trials and related cases. The interviews are all

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<sup>30</sup> The JCHR Report subsequently recommended that judicial views be sought in an open and transparent way: Joint Committee on Human Rights, *The Justice and Security Green Paper: Twenty-fourth Report of Session 2010-12* (HL Paper 286, HC 1777), [33]

<sup>31</sup> Neuberger, n 9, [44]

<sup>32</sup> ESRC Seminar Series, *The Role of Civil Society in the Management of National Security in a Democracy*, Seminar Three, 'The proper role of the judiciary', 24 January 2006, p 2 <[http://www2.lse.ac.uk/humanrights/articlesandtranscripts/esrc\\_seminar\\_3\\_judiciary.pdf](http://www2.lse.ac.uk/humanrights/articlesandtranscripts/esrc_seminar_3_judiciary.pdf)> (Last accessed: 20 May 2012)

<sup>33</sup> Neuberger, n 9, [29]

<sup>34</sup> Judicial Conference of Australia, 'Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012' <[http://www.jca.asn.au/publications/JCA\\_Senate\\_Submission.pdf](http://www.jca.asn.au/publications/JCA_Senate_Submission.pdf)> (Last accessed: 18 March 2012)

<sup>35</sup> See above, n 1

confidential and no individual will be identified in the publication of any results. The project is ongoing and findings are expected to be published in late 2012.

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# **‘SECRECY’ IN THE COURT OF PROTECTION**

*Lucy Series asks whether the judiciary’s approach can be explained by due caution or conspiracy*

The Court of Protection hears cases relating to some of the most morally and politically contentious issues of our day and about some of the most excluded and silenced people in our society. It is surely a good sign that the media, MPs and campaigners are sufficiently concerned about their plight that they take such an interest in this court’s new jurisdiction under the Mental Capacity Act 2005 (MCA). Yet there is a difficult balance to be drawn between protecting the privacy of the individuals and families at the heart of these cases, and ensuring that the wider democratic objective of transparency in our justice system is met. The Court of Protection is frequently described in the media as ‘secretive’, yet according to its judges this is an ‘old shibboleth’ which should be laid to rest.<sup>1</sup> Despite judicial efforts to permit greater media access and reporting, the reality is that the Court of Protection does not function like other courts, and information about its activities is still relatively limited.

There are many arguments in favour of greater transparency in the Court of Protection. In the most general of terms it is often said, following Jeremy Bentham, that:

Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.<sup>2</sup>

It is important that the decisions of the Court of Protection judges are open to public scrutiny in order to promote faith that its rulings are just and fair, and to prompt debate and reform if it is felt that they are not. Publicity is important for promoting wider understanding of the work of the court, for ensuring that politicians, officials and the wider public understand the kinds of issues it routinely handles. The Court of Protection often relies upon the evidence of expert witnesses; evidence which cannot be scrutinized, debated and subjected to peer review without greater openness. Many cases coming before the courts involve public authorities in the course of the health and welfare duties; surely their activities, particularly where they

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<sup>1</sup> Court of Protection, *Court of Protection Report 2010* (London 2011) p3

<sup>2</sup> Bentham, J., ‘Draught of a New Plan for the Organization of the Judicial Establishment in France’ *The Works of Jeremy Bentham* Vol iv (1843 Edinburgh: Tait)



impinge upon such fundamental human rights of such vulnerable citizens, should be subjected to scrutiny?

Despite strong arguments in favour of greater transparency in the Court of Protection, it can be extremely difficult to achieve without also impinging upon the interests of the courts' users. In this paper, I will outline this tension in two separate debates concerning transparency in the Court of Protection: media freedoms to attend and report Court of Protection proceedings; and the routine publication of anonymised Court of Protection judgments. I will argue that the courts have had good reason to be cautious about greater media access to hearings and litigants, but that the court could take greater steps towards transparency through introducing routine publication of anonymised judgments.

### **Media attendance and reporting restrictions in the Court of Protection**

The legal basis for reporting restrictions in the Court of Protection is an amendment to s12(1)(b) Administration of Justice Act 1960 (AJA), which makes it a contempt of court to publish any information relating to proceedings sitting in private brought under the MCA.<sup>3</sup> Interestingly, publication of information concerning cases heard in the Family Division of the High Court under the 'inherent jurisdiction'<sup>4</sup> rather than the MCA are not subject to such restrictions, despite a commonly held belief to the contrary<sup>5</sup>. The general rule in the Court of Protection is that hearings shall be brought in private<sup>6</sup>, meaning that s12(1)(b) AJA reporting restrictions will apply. However, r91 Court of Protection Rules 2007 permits the court to authorise the publication of information relating to private proceedings, and r92 permits the court to hold the hearing in private but to impose restrictions on the publication of any information in relation to those proceedings.

In 2009 the Court of Protection permitted journalists to attend court and report proceedings for the first time<sup>7</sup> in a case relating to the world famous blind and autistic pianist Derek Paravicini<sup>8</sup>. But contrary to *The Independent's* subsequent claims, this was not the creation of a 'new right'<sup>9</sup>, but merely the first time the media

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<sup>3</sup> Introduced by s10 Schedule 6 Mental Capacity Act 2005

<sup>4</sup> The 'inherent jurisdiction' is the legal basis upon which the court made decisions concerning adults who lacked mental capacity prior to the MCA. In general, the MCA has replaced the inherent jurisdiction, but it is occasionally still exercised in relation to vulnerable adults who *have* capacity. For an interesting discussion, see: Szerletics, A., 'Vulnerable Adults and the Inherent Jurisdiction of the High Court' *Exeter Autonomy Project Briefing Paper v1.1* (University of Essex, 2011)

<http://autonomy.essex.ac.uk/vulnerable-adults-and-the-inherent-jurisdiction-of-the-high-court>

<sup>5</sup> *RB (Adult), Re (No 4)* [2011] EWHC 3017 (Fam)

<sup>6</sup> r90 Court of Protection Rules 2007

<sup>7</sup> Cahal Milmo 'Secret court open to public gaze after Independent campaign' *The Independent* (London 14 May 2010) <<http://www.independent.co.uk/news/uk/home-news/secret-court-open-to-public-gaze-after-iindependenti-campaign-1973014.html>>

<sup>8</sup> *Re P* [2010] EWHC 1592 (Fam)

<sup>9</sup> Romana Canneti 'Shining a light into darkness at the Court of Protection' *The Independent* (London 27 February 2012) <<http://www.independent.co.uk/opinion/commentators/romana-canneti-shining-a-light-into-darkness-at-the-court-of-protection-7441319.html>>

had chosen to exercise their pre-existing ‘right’ to attend and report Court of Protection proceedings, as laid down in the Court of Protection Rules 2007. Since that time, *The Independent* reports that they have ‘won’ every application to attend Court of Protection proceedings.<sup>10</sup> However, although the rules do permit the media to attend court and to publish information relating to proceedings, the media complain that the application process is ‘cumbersome, time consuming and expensive’<sup>11</sup>, and requires them to commit significant resources to the cost of an application without any guarantee of a story at the end of it.<sup>12</sup> It would be a shame if this had a chilling effect on reporting of Court of Protection proceedings, and perhaps it would be desirable to have a more lightweight media application process. However it is unlikely the media will ever be granted the unfettered access to the court desired by some. The overriding objective of the Court of Protection includes ensuring that the interests and position of the incapacitated adult are properly considered<sup>13</sup> and that all parties are on an equal footing<sup>14</sup>. Without knowing what information the media might seek leave to report, nor how this might affect the rights and interests of the parties to a case, it is difficult to see how the court could offer journalists any ‘guarantees’ to a story in advance.

There are several respects in which the interests of court users may come into tension with the wider interests of transparency and publicity, the first of which is time and resources. Every application the media make to attend court must be scrutinized by all the parties to a case, and late applications can lead to exasperating delays for decisions on pressing matters<sup>15</sup>. The court’s decisions to permit media attendance and reporting are usually framed in terms of a balancing exercise between the Article 8 rights (respect for private and family life) of incapacitated adults and their families, and the Article 10 rights (freedom of expression) of the media. In *London Borough of Hillingdon v Neary & Anor (Rev 2)*<sup>16</sup> Mr Justice Jackson commented, ‘Publicity can have a strong effect on individuals, particularly if they are not used to it, or if... they are vulnerable to anxiety and to changes in their environment.’<sup>17</sup>

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<sup>10</sup> Ibid

<sup>11</sup> Phillips, G. ‘Family Courts and Transparency’ (Paper) *The All Party Parliamentary Group on Family Law and The Court of Protection* (Houses of Parliament, London 29 March 2011) p17 [http://familylaw.allpartyparliamentarygroup.org.uk/transparency/docs/APPG4\\_Gill\\_Phillips\\_Speech.pdf](http://familylaw.allpartyparliamentarygroup.org.uk/transparency/docs/APPG4_Gill_Phillips_Speech.pdf)

<sup>12</sup> Canetti, R. ‘Shining a light into darkness at the Court of Protection’ *The Independent* (London 27 February 2012)

<sup>13</sup> Court of Protection Rules 2007 r3(3)(b)

<sup>14</sup> Court of Protection Rules 2007 r3(3)(d)

<sup>15</sup> For example, in the case *P v Independent Print Ltd. & Ors* [2011] EWCA Civ 756 a late application was made by *The Independent* Newspaper to attend an important and long awaited hearing about P’s welfare. The court had no alternative but to adjourn a hearing about important welfare decisions in order to seek expert evidence on the impact that the publicity itself would have on P’s wellbeing.

<sup>16</sup> [2011] EWHC 413 (COP)

<sup>17</sup> *Neary v Hillingdon*, [15]

However, Jackson J also emphasised that there must be evidence which supported a proper factual basis for the claim that any given individual would suffer an adverse effect from publicity.<sup>18</sup> He also stressed that there was a genuine public interest in the work of the Court of Protection, and that it was not in the interests of the public in general or the individual litigants in any case for its work to be considered as secretive<sup>19</sup>. It was, he said, important that the media were able to report routine cases, that reflected the lives of ordinary people, as well as extraordinary cases like that of Derek Paravicini.<sup>20</sup>

In *W v M & Ors*<sup>21</sup> Mr Justice Baker found that the Article 6 rights (to a fair trial) of litigants might also be compromised if their capacity or willingness to participate in litigation were affected by the threat of media publication of identifying information, or attempts by the media to contact them.<sup>22</sup> This highly controversial case concerned whether a feeding tube should be withdrawn from a woman in a minimally conscious state to allow her to die. In an earlier unpublished ruling the court had issued an injunction banning reporters from approaching 65 named individuals involved in her care, or approaching within 50m of four named properties. This injunction was dubbed ‘draconian’<sup>23</sup>, even ‘evil’<sup>24</sup>, by campaigners emphasising the public interest in the case. However it is worth noting that the injunction did not prohibit reporters from attending or reporting court proceedings, merely from ‘doorstepping’ or identifying a very severely disabled woman, those charged with caring for her, and her grieving family.

In a later hearing these restrictions were reduced to cover merely her family; a decision which was accepted by *The Times Newspapers Ltd* – the only media outlet who actually sent representatives to court – on hearing the evidence of the family. The judgment described the family as being so fearful of media harassment that without such an injunction they might not have brought their case to court; when one reads the judgment in its 43,000 word entirety it is impossible not to have sympathy with their position. It is important that vulnerable litigants have confidence in protections against intrusive media interest so that publicity does not have a chilling effect on the cases that are brought to the Court of Protection. Nowhere in the media does it seem to be appreciated that if these cases are not brought to court, difficult decisions regarding adults who lack mental capacity do not go away. Outside of the

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> [2011] EWHC 1197 (COP)

<sup>22</sup> Ibid, [38]

<sup>23</sup> Solicitor Mark Stephens, quoted in Martin Beckford ‘Secrecy fears after court bans contact with 65 people’ *The Telegraph* (London 19 April 2011) <<http://www.telegraph.co.uk/news/uknews/law-and-order/8459270/Secrecy-fears-after-court-bans-contact-with-65-people.html>>

<sup>24</sup> John Hemming MP, quoted in Steve Doughty ‘Judge makes first ever order banning publication of information on Facebook and Twitter to prevent woman in coma from being named’ *The Daily Mail* (London 13 May 2011) <<http://www.dailymail.co.uk/news/article-1386541/Injunctions-hit-Facebook-Twitter-order-bans-publication-information.html>>

Court of Protection, disputes and complex moral and political questions are simply resolved by other means, which may offer fewer guarantees of fairness, equality of arms or scrutiny. Indeed, this was a growing problem prior to the introduction of the MCA. It may well be that the media are frustrated that their access to Court of Protection cases is restricted, but they should bear in mind that if litigants are driven away from taking these decisions to the Court of Protection through fear of media harassment, such decisions will be made in places far further from view.

### **Publication of anonymised transcripts of Court of Protection decisions**

Another means by which the decisions of the Court of Protection make their way into the public domain is the publication of written judgments, usually in anonymised form. However, despite some improvements, the framework for publication and dissemination of these rulings still leaves much to be desired. Many judgments are delivered *ex tempore*, meaning publication would incur significant transcription costs. However, even those judgments which are delivered in written form do not routinely make their way into the public domain. Leave to publish any judgment is left to the discretion of the individual judge, and although senior judges – including the President of the Court of Protection Sir Nicholas Wall<sup>25</sup> and Lord Justice Munby<sup>26</sup> – have exhorted their colleagues to routinely publish written and anonymised judgments, this plea does not seem to have met with widespread enthusiasm.

The Court of Protection itself has complained that ‘practitioners and judges have been hampered by a lack of reported case law and inconsistent reporting of judgments handed down by the Court of Protection’.<sup>27</sup> It was suggested<sup>28</sup> that the problem had been resolved with the creation of a dedicated Court of Protection database on BAILII<sup>29</sup> in October 2010. The BAILII Court of Protection database is certainly welcome, but for reasons which are unclear it still has remarkably few published judgments. For example the BAILII website has only 20 published judgments for 2011<sup>30</sup>, yet the Court of Protection makes thousands of decisions each year, and issues hundreds of welfare orders.<sup>31</sup> The independent website Mental Health Law Online<sup>32</sup> hosts significantly more Court of Protection judgments than BAILII; it is unclear why judgments which can be published on this site are not

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<sup>25</sup> Hill, A., ‘Court of protection should be open to public scrutiny, says leading judge’ *The Guardian* (London 06 November 2011)

<sup>26</sup> Lord Justice Munby ‘Lost opportunities: law reform and transparency in the family courts’ [2010] CFLQ 273

<sup>27</sup> Court of Protection, *Court of Protection Report 2010* (London 2011) p9

<sup>28</sup> Ibid

<sup>29</sup> <<http://www.bailii.org/ew/cases/EWHC/COP/>>

<sup>30</sup> <<http://www.bailii.org/ew/cases/EWHC/COP/2011/>> [accessed 16 March 2012]

<sup>31</sup> Data for 2011 is not yet available, but see the *Court of Protection Report 2010* (n27), p25 for data on 2010.

<sup>32</sup> <[www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)>

routinely published on the other. The 39 Essex St Court of Protection Newsletter<sup>33</sup> is widely read in court and legal circles, and Jordans Publishing recently launched a new series of Court of Protection Law Reports, although the price tag may be off-putting to non-legal audiences. Despite these efforts, however, the majority of Court of Protection decisions are not published, anonymously or otherwise.

It is often suggested by lawyers that where a case is of legal importance it will be published, however recent cases in the Court of Protection suggest this is not uniformly happening. In *A London Local Authority v JH & Anor*<sup>34</sup> District Judge Eldergill was referred by counsel to the unreported case *Re: GC*<sup>35</sup> which he found ‘helpful’ in reaching his decision. More recently, the Court of Appeal was asked in *K v LBX*<sup>36</sup> to consider ‘an apparent conflict between the line of High Court/COP decisions which are at odds with a developing line of cases at the same level’.<sup>37</sup> One of these two apparently conflicting lines of Court of Protection case law was well publicised and well known to lawyers and health and social care professionals; it suggested that where a decision must be made about where an incapacitated adult should reside, priority should be given to placement in the family home. However, a second line of case law, unpublished and unknown to most professionals and lawyers had also been evolving in the Court of Protection; this line of reasoning suggested that there was no such ‘starting point’ or priority for family placements.

Readers with an interest in health and social care will quickly realise the significance of such a change of direction in mental capacity case law. In the first instance hearing of *K v LBX*, which is itself still unreported<sup>38</sup>, Mrs Justice Theis had relied upon an unreported judgment by Roderic Wood J<sup>39</sup> and her own ‘more recent experience of such cases’ to argue that there had been a ‘philosophical and practical shift’ towards placements promoting ‘greater independence’ rather than maintaining the status quo of family life.<sup>40</sup> From the perspective of equality of arms, of legal certainty, of ensuring that health and social care professionals are appraised of the correct approach to take when making best interests decisions on behalf of incapacitated adults, it seems indefensible that counsel and judges should be able to refer to, and rely upon, judgments which are not in the public domain. It also seems likely that such failures to publish written judgments of legal significance could be in violation of the UK’s obligations under Article 6 European Convention on Human Rights.<sup>41</sup>

<sup>33</sup> For backcopies, see: <[http://www.mentalhealthlaw.co.uk/39\\_Essex\\_Street\\_COP\\_Newsletter](http://www.mentalhealthlaw.co.uk/39_Essex_Street_COP_Newsletter)>

<sup>34</sup> [2011] EWHC 2420 (COP); no paragraph numbers are available for this judgment.

<sup>35</sup> [2008] EWHC 3402 (Fam), per Hedley J

<sup>36</sup> [2012] EWCA Civ 79

<sup>37</sup> *K v LBX* (n36) [1]

<sup>38</sup> As of 19 March 2012, although it is my understanding that efforts are being made to seek permission from the judge to publish the ruling.

<sup>39</sup> *D County Council v LS* [2009] EWHC 123 (Fam) (unreported)

<sup>40</sup> *K v LBX* (n36) [27]

<sup>41</sup> *Pretto & Ors v. Italy* (App No 7984/77) [83] ECHR 15; (1984) 6 EHRR 182

However, even ensuring that cases of *legal* interest are published will, in my view, be insufficient to quell concerns about transparency in Court of Protection proceedings. As Munby LJ has written:

Releasing for publication only those judgments which are ‘reportable’ means that the public obtains a seriously skewed impression of the system. What one might call ‘routine’ judgments in ‘ordinary’ care cases and private law cases should surely also be published -- all of them, unless, in the particular case, there is good reason not to.<sup>42</sup>

For example the activities of public authorities in relation to incapacitated adults which bring them to the Court of Protection may not be of ‘legal’ interest, but they are of significant social and policy interest. Requiring routine publication of anonymised judgments, including the identities of any public authorities involved in the cases, would go some way towards dispelling a view which is taking hold in some quarters that the courts, experts and public authorities are in cahoots, exercising sinister and unaccountable powers over vulnerable people and silencing those who speak out. The reality I suspect is not that the courts are engaged in some sinister conspiracy, rather that the current haphazard system for publication is struggling amidst high and growing judicial workloads. It was found in a pilot project to routinely publish certain rulings under the Children Act 1989 that judges struggled without additional resources allocated for transcription and anonymisation.<sup>43</sup> The difficulty may also be judicial culture. The judges of the Court of Protection see this work day-in, day-out, and perhaps they do not understand the fascination and concern even the most routine-seeming cases may hold for the wider public. Yet for as long as publication rests on judicial discretion it will be hard to promote public faith in the inner workings of the court amidst unverifiable, and hence uncontestable, hints and allusions that darker forces are at work in those other, unpublished, cases.

## © Lucy Series

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<sup>42</sup> Lord Justice Munby ‘Lost opportunities: law reform and transparency in the family courts’ [2010] CFLQ 273

<sup>43</sup> Ministry of Justice, ‘The Family Courts Information Pilot: November 2009–December 2010’ (Report) (London 2011)





# **SPEAKER LIST**

## **JUSTICE WIDE OPEN**

CITY UNIVERSITY LONDON

29 FEBRUARY 2012, 9am-2pm

**Introduction**, Professor Howard Tumber, co-director, Centre for Law, Justice and Journalism

**Opening talk**, Mr Geoffrey Robertson QC, founder and head of Doughty Street Chambers and ‘distinguished jurist’ member of the United Nations Justice Council

**Session One: The flow of legal knowledge**, chaired by Professor Howard Tumber

- Hugh Tomlinson QC, Matrix Chambers
- Dr David Goldberg, information rights academic and activist
- Emily Allbon, Law Librarian, City Law School

**Session Two: Legal reporting and the media**, chaired by Judith Townend, PhD researcher

- Heather Brooke, journalist and activist
- Mike Dodd, editor of PA Media Lawyer
- Adam Wagner, barrister, One Crown Office Row and editor of the UK Human Rights Blog
- William Perrin, founder, Talk About Local and member of the Crime and Justice Sector Panel on Transparency

**Session Three: An academic perspective**, chaired by Professor Ian Loveland, Professor of Public Law, City Law School

- Professor Ian Cram, Professor of Comparative Constitutional Law, University of Leeds
- Dr Lawrence McNamara, Reader in Law and ESRC/AHRC Research Fellow, University of Reading





# RESOURCES / CONTACT

Resources and further information about the project can be found on the website of the Centre for Law Justice and Journalism, City University London at

- <http://www.city.ac.uk/lawjusticejournalism>
- <http://bit.ly/openjustice>

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